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Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century

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SOVEREIGN BARGAINS, INDIAN TAKINGS, AND THE PRESERVATION OF INDIAN COUNTRY IN THE TWENTY-FIRST CENTURY

Raymond Cross*

Lift your weapons. Here is the one that resists intentions.¹

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I. INTRODUCTION

Physical takings of Indian lands erode the Indian peoples' political and cultural autonomy.² As "domestic dependent nations" they are distinguished from other minority groups within the United States.³ As self-governing societies long

2. Physical takings of Indian lands involve the wrongful appropriation, seizure, or interference with the Indians' right to otherwise dispose of, or control, their lands. *See*, JULIUS L. SACKMAN, 2A NICHOLS ON EMINENT DOMAIN § 6.05[1], at 6-56 to 6-58 (3d ed. 1997).

3. Before European discovery, Indian peoples represented fully sovereign nations. But after discovery, their international legal status was that of "domestic dependent nations." *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

before America was discovered by sixteenth-century European explorers, their rights to self-governance and cultural autonomy were embodied in many treaties with European governments.⁴ The federal government likewise entered into Indian treaties that confirmed the Indian peoples' land titles and governmental authority.⁵ The Supremacy Clause of the United States Constitution gives effect to these sovereign bargains by barring state or private interference with the Indian peoples' lands or their self-governance therein.⁶

But these sovereign bargains have demonstrably failed to preserve the Indian peoples' most valuable asset—their lands. Many Indian treaties prohibited the federal acquisition of Indian lands except with the express consent of a majority of the adult male members of the affected Indian tribe.⁷ Indian consent to federal land cessions served to legitimate the treaty-making process. But this idea of Indian consent, along with the broader concept of tribal sovereignty, was swamped by the nineteenth-century land demands of non-Indian settlers who had little sympathy for the Indian peoples or their treaty rights. Indian treaty making in the mid-to-late nineteenth century became the diplomatic “cover” for coerced and patently unfair Indian land cession agreements.⁸ Millions of acres of Indian lands were taken by the federal government in outright congressional defiance of the Indian consent provisions of many treaties.⁹ Spurious land cession agreements and coerced Indian

4. Indian treaties evidenced an “essential [sovereign] equivalence” between the European nations and the respective treaty tribes. STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 46 (1988). The treaties were multifaceted diplomatic instruments whose purposes included mutual declarations of peace and friendship, establishment of trading relations, and the legitimation of major transfers of land from the Indian peoples to the respective discovering nations. *Id.* at 46–47.

5. The United States continued during and after the Revolutionary War to regard the Indian peoples as independent sovereign nations. 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES AND THE AMERICAN INDIANS* 31 (1984).

6. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

7. Article 12 of the Treaty of Medicine Lodge Creek, for example, declared that no part of the Kiowa and Comanche lands would be ceded without the consent of at least three-fourths of the adult male members of the tribe. Treaty with the Kiowa and Comanche Tribes of Indians (Treaty of Medicine Lodge Creek), Oct. 1, 1867, art. 12, 15 Stat. 581, 585. But Congress, by its Act of June 6, 1900, ratified the agreement of the Jerome Commission for the Indians' cession of their reserved lands, even though far fewer than the required number of Indians had consented to that agreement. Act of June 6, 1900, ch. 813, 31 Stat. 676. This disregard of the Indian consent provision prompted Lone Wolf, a Kiowa Indian, to sue to enjoin Interior Secretary Ethan Allen Hitchcock from implementing that act on his reservation. *Lone Wolf v. Hitchcock*, 107 U.S. 43 (1903).

8. Treaty-based Indian land cessions are characterized by Stephen Cornell as the “characteristic form” of dispossession of the Indian peoples during the “Indian conflict years” from the late eighteenth to late nineteenth centuries. CORNELL, *supra* note 4, at 45.

Peter Wolf estimates that Indian land cession agreements between 1789 and 1850 transferred some 450 million acres of Indian land to full federal ownership. The amount paid to the Indians for these lands amounted to 90 million dollars or an average price of 20 cents an acre. See PETER WOLF, *LAND IN AMERICA: ITS VALUE, USE, AND CONTROL* 69 (1981).

9. Cornell emphasizes that in 1800, after nearly 200 years of European colonization, the bulk of what are now the “48 states” was Indian land. But by 1900, the

land transfers in the mid-to-late nineteenth century were devastating for the Indian peoples: they today retain only some fifty-seven million acres of their lands that once stretched from the Atlantic Seaboard to the Pacific Coast.¹⁰ More significantly, the contemporary Indian peoples' survival as distinct cultural and economic entities has been jeopardized by this rapid and massive shrinkage of their land base.

The demonstrable failure of these Indian treaties to prevent the federal taking of Indian lands requires resort to an alternative legal strategy for the contemporary preservation of the remaining Indian lands. A modern Indian takings doctrine holds perhaps the best hope for achieving this goal. Such a doctrine is compatible with Chief Justice Marshall's historically imposed Indian bargaining model.¹¹ It also complements the contemporary "government-to-government" relationship between the federal government and the Indian peoples.¹² This proposed doctrine would mitigate the federal takings incentive that implicitly derives from Marshall's Indian bargaining model. Marshall's model has effectively cloaked from judicial scrutiny spurious Indian land cession agreements or unilateral federal action that rapidly shrunk the Indian land base from its 1848 size of a billion plus acres to some forty-million acres by 1934.¹³

Indian lands were almost entirely in non-Indian hands. What had occurred in the interim was not just the dispossession of the Indian peoples of their aboriginal lands, but the larger transformation of the American economy as a capitalist society that successfully commercialized land, labor, and capital as marketable commodities. Indian lands were gradually incorporated into this larger American economy. CORNELL, *supra* note 4, at 34-38.

10.

Indian tribes and [individual tribal members] own approximately 56.6 million acres of land, an increase of more than 4 million acres since 1980.... Alaskan Natives hold another 44 million acres as a result of the Alaskan Native Claims Settlement Act. In all, Native American groups hold about 4.2% of the land in the United States.

DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 20 (3d ed. 1993).

11. Marshall's Indian bargaining model derived from older sources such as Article III of the 1787 Northwest Ordinance. Act of Aug. 7, 1789 (Northwest Ordinance), ch. 8, art. 12, 1 Stat. 50, 52. That article committed the United States to display the "utmost good faith" toward the Indian peoples and pledged that their "land and property shall never be taken from them without their consent." *Id.*

12. President Richard Nixon in his 1970 Indian Message to Congress called for a new federal policy of "self-determination" for the Indian peoples. Congress responded by enacting several new Indian statutes that confirmed the inherent sovereign powers of the Indian peoples and sought to establish a meaningful "government-to-government" relationship between federal agencies and the affected Indian peoples. GETCHES ET AL., *supra* note 10, at 253-59.

13. In 1903, the Supreme Court decided, based on Chief Justice Marshall's Indian law opinions, that Congress enjoyed a "[p]lenary authority over tribal relations...not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The *Lone Wolf* doctrine permits the federal government to unilaterally abrogate Indian treaties if they conflict with an overriding federal

By contrast, a modern Indian takings doctrine would explicitly acknowledge the indispensable role that land plays in sustaining contemporary Indian societies as viable cultural, and economic entities. Ironically, Marshall's Indian bargaining model likewise acknowledged Indian lands as essential for the governmental, cultural and economic survival of the Indian peoples. But his model grew out of assumptions that even by his era were patently untenable. Marshall envisioned Indian treaties as the consensual means for organizing the chaotic field of Indian affairs over a wide array of subject-matter areas: trade, criminal jurisdiction, war and peace, and land transactions.¹⁴ Indeed, reigning nineteenth-century economic theory suggested that such a consent-based system would yield sovereign bargains that represented "Pareto-superior" outcomes for both the federal government and the affected Indian peoples.¹⁵

But Marshall's seemingly laissez faire system of Indian bargaining was undermined from the outset by background demographic changes and evolving military realities. The Indian peoples should have expected, given the nature of bargaining process, that they were free to bargain regarding any issue and that bargains, once made, would bind both the federal government and the affected Indian peoples.¹⁶ But these idealized background conditions have rarely, if ever, governed Indian bargains with non-Indians regarding land cessions. Some of the eastern Indian peoples may have possessed a temporary bargaining equality with the European colonizers that made land cession agreements between them both feasible and practicable.¹⁷ But fundamental practical and demographic changes in

interest or no longer serve the best interest of the affected Indian people.

14. Indian treaties were multifaceted diplomatic instruments that allowed for the mutual adjustment of military, jurisdictional, trading, and land issues between the federal government and the Indian peoples. CORNELL, *supra* note 4, at 46.

15. The Pareto principle assumes that as "long as individuals know what is best for themselves, they can enter only into those bargains that are best for themselves." RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 8-9 (1993). The Indian peoples and the federal government are regarded by the treaty-making process as if they were a single person that knows "its" preferences when measured against the pretreaty circumstances. Epstein concludes that assuming the "stringent Pareto conditions are satisfied," there is no "reason to worry about the terms and conditions that the [federal] government attaches to its bargain." *Id.*

The absence of constitutional limits on state power creates a socially destructive "prisoner's dilemma," wherein disorganized land owners are unable to prevent the state from imposing "collateral or unrelated" conditions upon their continued use of their lands. *Id.* at 79.

16. Richard Epstein and other constitutional scholars recognize that there must be a limit to state coercive power over private property rights because the "creation of [state] monopoly power [over those rights] poses a great danger of abuse." *Id.* at 78.

17. Whether the Indians ever willingly sold their lands to the European colonists and fully appreciated that they were forever giving up their land titles has long been a subject of historical debate. Some historians argue that the eastern Indian tribes had fairly well-developed concepts of land tenure especially with regards to the assignment of territory for the purposes of planting and residence. Actual property rights in the Indians' lands resided in the individual or family unit. See ALDEN T. VAUGHN, *THE NEW ENGLAND FRONTIER: PURITANS AND INDIANS, 1620-1675*, at 105-07 (1979).

the eighteenth and nineteenth centuries substantively undermined the Indian peoples' ability to negotiate fair terms and conditions of land cession agreements.¹⁸ The Indians' ability to prevent non-Indian takings of their lands increasingly depended on their diplomatic acumen in forging trading or military alliances with rival European or colonial interests.¹⁹ But the triumph of the British Crown over the French in 1763, followed by the successful American revolution against British rule in 1783, effectively eliminated the Indians' opportunity for strategic alliances that would preserve their lands from non-Indian intrusion.²⁰

The historian Wilcomb E. Washburn also challenges the "prevailing assumption among Americans that the bulk of the land of the United States was simply appropriated from the Indians without benefit of law or compensation." WILCOMB E. WASHBURN, *RED MAN'S LAND, WHITE MAN'S LAW* 109 (2d ed. 1995). He cites Thomas Jefferson's *Notes on the State of Virginia* (1787) wherein Jefferson asserts:

That the land of this country [was] taken from them [(the Indians)] by conquest, is not so general a truth as is supposed. I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country we know has been acquired altogether by purchases made in the most unexceptional form.

Id.

Other historians agree that early colonial land practices generally observed the formal niceties of purchase of Indian land title. The respective Puritan governments apparently controlled their subjects' purchases of Indian title and required that any potential purchaser of Indian lands obtain prior governmental consent or that they purchase Indian lands through governmental agents. These non-Indian purchasers used standard deed forms but many times required the signatures not only of the individual land claimant but of the tribal "sachem" as well. These colonial era purchasers were also careful to make their deeds of purchase as specific as possible to avoid later challenge from competing non-Indian claimants.

But Indian land, because the epidemics of 1616–17 and 1633–34 had devastated the eastern Indian populations, became a surplus commodity in New England. The colonialists offered the Indians hoes and metal knives—implements of great value to a neolithic people—and in exchange acquired vast tracts of Indian lands. VAUGHN, *supra*, at 107–08.

18. The eastern Indian tribes' power to upset the delicate balance of European power in the New World of the early eighteenth century was exploited by the Iroquois and the southern Indian nations—the Choctaws, Creeks, Chickasaws, and Cherokees—as a means of protecting their lands and economic resource bases. CORNELL, *supra* note 4, at 26–27.

19. Cornell contends that the major eastern Indian tribes were able to resist non-Indian encroachment on their lands through a "fortuitous combination of elements: military strength, European alliance and practical economics." *Id.*

20. By the latter half of the eighteenth century, French power in the New World collapsed with the Treaty of Paris in 1763, by which France ceded all of its territory east of the Mississippi to Britain. The eastern Indian tribes could no longer play off the European powers against each other in order to preserve their lands and resources. *Id.* at 27.

By the Treaty of Paris of 1783 ending the American Revolutionary War, the British Crown transferred its territorial claims east of the Mississippi to the United States. The newly formed Continental Congress took a radically different attitude toward these territories; whereas the British Crown considered those lands "Indian Country," the

The substantial erosion of the Indian populations and their military capability directly contributed to their reduced nineteenth-century legal status. This reality was candidly acknowledged by Chief Justice Marshall in his Indian law opinions.²¹ He referred to the Indian peoples' diminished political and legal status as the "actual state of things."²² This contemporary reality justified their incorporation as "domestic dependent nations" into the body of the United States.²³ Marshall had earlier concluded that it justified the incorporation of the Indians' aboriginal land titles into the federal system of property rights.²⁴

Marshall's Indian bargaining model envisioned the federal government as the senior partner and the Indian peoples as the junior partners in any future sovereign bargaining process. Indeed, his opinions implicitly authorized a federal bypass of recalcitrant Indian bargainers by allowing the federal government to make out grants of Indian lands subject to continued Indian use and occupancy rights.²⁵ Although modern legal parlance recognizes that imbalances in economic and legal powers make a mockery of the bargaining process,²⁶ such power imbalances were hardwired into Marshall's Indian bargaining model. Marshall's Indian law opinions undermined the Indians' inherent sovereignty over their

American Congress viewed its new territories as a source of revenue and as a means for pacifying and paying off restive war veterans. *Id.*

As a practical matter, the Eastern Indian peoples now faced one single power, the United States, and were no longer able to play off competing European powers against one another for their own security and advantage. 1 PRUCHA, *supra* note 5, at 31.

21. Marshall's Indian Law Trilogy includes the following decisions: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

22. *Johnson*, 21 U.S. (8 Wheat.) at 591.

23. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

24. *Johnson*, 21 U.S. (8 Wheat.) 543.

25. In *Beecher v. Wetherby*, 95 U.S. 517 (1877), the Supreme Court held that the United States could grant good title to Indian lands:

The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy.... The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government.

Id. at 525.

Father Prucha emphasized that Marshall's legal theory eventually evolved into a dictum that the United States held virtually absolute dominion over the Indian lands leaving the Indian peoples with merely a usufructuary interest in the lands they occupied. 1 PRUCHA, *supra* note 5, at 15-16.

26. The modern contract doctrine of "unconscionability" focuses on those disparities in bargaining power that are evidenced by a "party's employment of sharp practices,...the use of fine print and convoluted language and an inequality of bargaining power." E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28, at 314-15 (1982).

aboriginal lands.²⁷ He judicially restricted the Indians' power to cede their lands to anyone but the federal government.²⁸ He nonetheless insisted that they possessed sufficient legal capacity to ensure fair land dealing with their paramount sovereign, the federal government.²⁹ Modern bargaining theory would candidly acknowledge that the Indian peoples' subordinated legal status fundamentally compromised their ability to bargain fairly with the federal government.³⁰ Thus, it is not surprising that Marshall's Indian bargaining model has failed to preserve the Indians' lands and cultures.

Today's near extinction of the Indian peoples' cultures and economies cries out for a new land-based relationship with the federal government. This new relationship would not presume that today's Indian peoples are equal bargainers with the federal government. Indeed, it would presume the opposite—that today's Indian peoples face a heightened risk of federal takings of their lands given Congress' now plenary power over their remaining lands. Such a relationship would recognize that Indian lands are the essential means for the realization of the contemporary federal policy of tribal self-determination. This new relationship would further acknowledge that the development of contemporary Indian economies and cultures are inextricably linked to the preservation of their lands.³¹

A modern Indian takings doctrine would help mitigate the federal taking incentive that unavoidably arises from the congressional plenary power over Indian lands. First, it would unequivocally require the payment of just compensation for the federal taking of any Indian lands. Second, it would require the award of, under the appropriate factual circumstances, substitute or replacement value for those lands. The federal judiciary would be empowered to ensure that the affected Indian peoples, like other land owners, are justly compensated for their lost resources.³²

Such a doctrine would not, by itself, ensure the preservation of contemporary Indian societies as viable economic and cultural entities. But

27. Richard Epstein speaks of the government's threat of force as the major destabilizer of any system of property rights. Such property rights remain in Epstein's "state of nature" absent not only their definition but their successful enforcement and protection, as well. EPSTEIN, *supra* note 15, at 76.

28. *Johnson*, 21 U.S. (8 Wheat.) at 587.

29. Indian treaties are misleading, Cornell asserts, because they suggest an "essential [sovereign] equivalence" between the United States and the respective signatory Indian tribes that the Supreme Court has never honored. CORNELL, *supra* note 4, at 46–47.

30. Epstein rejects as morally reprehensible the "bargaining game" wherein governmental threat may involve the use of force against an individual's person or property. EPSTEIN, *supra* note 15, at 41. The Indian peoples were on many occasions confronted with the federal government's "offer they could not refuse."

31. Land is inextricably bound up within the Indians' "webs of kinship, ritual and custom" so that at a conceptual and practical level each "received the imprint of the other." CORNELL, *supra* note 4, at 38–39.

32. Indian lands, especially treaty reserved lands, arguably qualify as "public facilities" whose taking require compensation measured by the reasonable cost of a "substantially equivalent substitute." 4 NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 12C.01[3][d], at 12C–38.

coupled with other features of today's Indian self-determination program, it would contribute to those goals.

This Article develops a modern Indians taking doctrine by critically examining the unfolding of Marshall's Indian bargaining model through three distinct eras:

1. Chief Justice Marshall's construction of the Indian bargaining model as an American adaptation of the European doctrine of discovery;

2. the Supreme Court's subsequent reformulation of that model as the Indian plenary power doctrine; and

3. the Court's failed reconciliation of the Indian plenary power doctrine with the just compensation command of the Constitution.

These three eras are summarized and then fully analyzed as the backdrop that demonstrates the necessity for a modern Indian takings doctrine. A sketch of such a doctrine is provided by a case study of the most egregious modern Indian taking: the 1949 taking of the Fort Berthold Indian Reservation. This taking triggered a forty-three-year-long struggle by the Fort Berthold Indians for just compensation. This struggle encapsulates the legal and practical disadvantages that confront Indian peoples who bargain with Indian congressional committees over the terms governing the taking of their lands. From this case study are extracted economic and doctrinal principles that will form the backbone of modern Indian takings doctrine.

A. Chief Justice Marshall's Construction of the Indian Bargaining Model

Marshall's Indian bargaining model broke down for two simple reasons. First, the Indian peoples had been disabled by Marshall's opinions, which prevented the Indians from alienating their lands to anyone but the federal government. The United States enjoyed the enviable, strategic position of a "super-monopsonist"—the sole, sovereign buyer of the Indian peoples' lands.³³ Second, the federal government was implicitly empowered by Marshall's opinions to repudiate its Indian bargains if they later conflicted with overriding federal interests.³⁴

33. Exclusive federal control over Indian lands must be viewed as one means for realizing emergent national interests in the mid-to-late nineteenth century. Stephen Cornell argues that intertwined nineteenth-century ideas of progress, nationalism, and religious mission forms the backdrop for understanding America's attitudes towards Indians and their lands. Chief Justice Marshall, and other Indian policy makers, confronted an American West that was controlled and peopled by Indians. His task was the practical and hopefully fair incorporation of those Indian lands as the raw materials out of which a future vision of America would be shaped. CORNELL, *supra* note 4, at 34–39.

34. Marshall had casually analogized the Indian peoples' relationship to the federal government as like that of "ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). A later Supreme Court decision transformed that casual analogy into a "[p]lenary [congressional] authority over tribal relations...not subject to control by the judicial department of government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565

But the shadow of Marshall's vision and the inertia of history has long prevented judicial reexamination of the Indian bargaining model. Its historic weight squelched the Indian peoples' taking claims based on alleged governmentally coerced Indian land transfers, inadequate compensation payments, or the disregard of federal trust or fiduciary obligations. In its contemporary and refurbished version, it sanctions Congress' plenary power over Indian lands by foreclosing judicial scrutiny of putative "good faith" federal takings of Indian lands.³⁵ It is time now to fundamentally reassess that model that has so long countenanced the federal taking of Indian lands in derogation of the just compensation command of the Constitution.³⁶

The Indian consent provisions of many Great Plains Indian treaties were intended to mitigate the recognized disparity in nineteenth-century bargaining power between the federal government and the respective Indian peoples. If they had been judicially enforced to their terms and tenor, there would doubtless be far more Indian lands than there are today. But these consent provisions were soon swamped by Congress' obsession with national goals, which loomed far larger than its promises to the Indian peoples.³⁷

In his 1823 opinion in *Johnson v. M'Intosh*, Marshall concluded that the federal government possessed the sovereign and exclusive power to acquire Indians lands via purchase or conquest.³⁸ Thus, the Indian peoples' aboriginal lands were subjected to Congress' paramount authority.³⁹ This underlying dynamic of federal paramount power over Indian affairs was fundamentally transformed as a congressional power to unilaterally redefine Indian property rights. The Supreme Court held that Congress possessed this judicially unreviewable power over Indian lands in Justice White's 1903 opinion in *Lone Wolf v. Hitchcock*.⁴⁰

(1903).

The *Lone Wolf* doctrine permits the federal government to abrogate federal Indian treaties or agreements if those agreements conflict with an overriding national interest or are no longer deemed in the best interest of the affected Indian people. Nell Jessup Newton, *The Judicial Role in Fifth Amendment Taking of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 254-55 (1982).

35. Professor Newton traces the legal history of Indian taking claims against the United States and concludes that Congress' plenary power over Indian lands still "qualif[ies] the extent to which a tribe can recover on the merits [of its claim]." Newton, *supra* note 34, at 254-55.

36. Congress exercises plenary power over Indian lands and may take those lands as an incident of its trusteeship authority over the Indian peoples. *Id.*

37. Cornell cites the following ideas of "manifest destiny, dreams of empire and vision of Progress" as "fueling [the United States'] westward expansion." CORNELL, *supra* note 4, at 38.

38. 21 U.S. (8 Wheat.) 543, 587 (1823).

39. See *id.* The noted historian Wilcomb E. Washburn views Marshall's opinion in *Johnson* as "the basis of all subsequent determinations of Indian right." WASHBURN, *supra* note 17, at 66.

40. 187 U.S. 553 (1903).

Indian land owners thus have been deprived of the constitutional protection afforded other land owners under the Just Compensation Clause.⁴¹ That clause prohibits the uncompensated or undercompensated taking of privately owned lands. This Indian exemption has had stark consequences for these culturally distinct, land-based societies; once fiercely self-reliant and economically independent, Indians now constitute America's most impoverished and insular minority population.⁴²

B. The Giving and Taking of Indian America

The Indian peoples are traditionally depicted as the willing and fairly compensated "givers" of their lands to the European colonizers. The familiar painting of the Canarsie Indians' bargain in 1626 that transferred Manhattan Island to Peter Minuet, Director of the Dutch West Indian Company, for twenty-four dollars in Indian trade goods, trinkets, and rum exemplifies this European view of Indian bargaining.⁴³ But the Indians' counternarrative views the Europeans as the "takers" of their lands. The 1948 photograph of the taking of the Fort Berthold Indian Reservation powerfully depicts this reality.⁴⁴ There, Tribal Chairman George Gillette of the Three Affiliated Tribes covers his eyes with his left hand as he openly weeps beside Interior Secretary Krug—the Indians' trustee—as he signs the documents taking the Fort Berthold Indian Reservation as the site for a large federal water project.⁴⁵

41. Newton emphasizes that Indian land owners do not enjoy the same constitutional protection from uncompensated takings as do other private landowners under the Just Compensation Clause of the Fifth Amendment. Newton, *supra* note 34, at 248–49.

42. "Per capita income for Native Americans in 1991 was slightly more than \$8300, the lowest for all racial groups in the United States, and less than half the level for the entire population." GETCHES ET AL., *supra* note 10, at 16. The Indian unemployment rate as of 1991 was 45%. That is 3% lower than 1989 but still more than 37% higher than the average unemployment rate for the United States as a whole. *Id.*

43. Indian giving of land title did not always redound to the benefit of Europeans. American humorist Nathaniel Benchley contends that the Dutchman Minuet was, in fact, the unwitting victim of the first Indian "bait and switch" con in America! Chief Seyseys, the unscrupulous leader of the Canarsee Indians, exploited Minuet's ignorance about which Indian tribe actually held the "use and occupancy" rights to Manhattan Island. Nathaniel Benchley, *The \$24 Swindle*, AM. HERITAGE, Dec. 1959, at 62.

Benchley asserts that another Indian tribe, the Weckquaesgeeks, actually held title to the upper two-thirds of Manhattan Island. As Benchley tells the story, the wily old chief Seyseys readily agreed to remove his few tribal members from lower Manhattan Island and "he took the sixty guilders' worth of knives, axes, clothing, and beads (and possibly rum), and went chortling all the way back to Brooklyn." *Id.* at 93.

44. This photograph may be viewed in PETER IVERSON, PLAINS INDIANS OF THE TWENTIETH CENTURY 144 (1985).

45. Historian Roy Meyer describes "an emotion filled ceremony" on May 28, 1948, in Secretary Krug's Washington, D.C., office. There, Chairman Gillette and 13 other tribal council leaders signed a contract by which the Fort Berthold Indians relinquished title to over 153,000 acres of treaty-reserved lands as the site for the Garrison Dam and Reservoir. Chairman Gillette remarked that "our Treaty of Fort Laramie, made in 1851, and our tribal constitution are being torn into shreds by this contract." Roy G. Meyer, *Fort*

The Indian peoples' challenges to the underlying validity of Indian land cession agreements have long been stifled by uncritical adherence to Marshall's Indian bargaining model. Indian complaints that they did not understand the cession agreements that they had signed, or that the federal treaty commissioners had obtained their signatures by threat, or during their collective, liquor-induced stupor, or through outright fraud, have been shrugged off as not within the federal courts' jurisdiction.⁴⁶ Such Indian complaints were simply not heard by the courts unless Congress expressly granted them legal or equitable jurisdiction to do so. But the widely varying jurisdictional terms of these statutory grants subjected Indian land rights to a "rigged lottery" approach to just compensation.⁴⁷

Congress' plenary power over Indian lands has been only modestly limited by contemporary judicial decisions.⁴⁸ Federal courts may now scrutinize federal Indian legislation under the rational basis test.⁴⁹ But this modest review standard does not significantly alter the egregious power disparity that is exhibited most fulsomely in the federal takings of Indian lands.⁵⁰ The Supreme Court's 1980 decision in *United States v. Sioux Nation of Indians*⁵¹ reaffirmed the federal government's plenary power over Indian lands. While the Court in *Sioux Nation* rejected the irrebutable presumption of congressional good faith that it had declared in its *Lone Wolf* decision, and replaced it with a "good faith in fact" test, it did little to ensure that Indian peoples will be justly compensated for their taken lands.⁵²

Berthold and the Garrison Dam, 35 N.D. HIST. 215, 259 (1968).

The Garrison site was selected by Colonel Lewis A. Pick of the U.S. Army Corps of Engineers as essential to the success of the Pick-Sloan Project even though his predecessor had rejected that site as unsafe. Major General Lytle Brown had reported to Congress in 1931 that the Garrison site was rejected because it was "entirely impracticable because of the lack of suitable foundation for a dam of such magnitude." *Id.* at 239 n.2.

46. Because many Indian tribes were at war with the federal government in 1863, the Congress barred the Indian peoples from bringing any claims against the United States in the Court of Claims. The tribes needed a special act of Congress that waived the sovereign immunity of the United States in order to bring and maintain such a claim. GETCHES ET AL., *supra* note 10, at 311.

47. Rosenthal concludes that the admitted inadequacy and inconsistency of these special jurisdictional acts cried out for congressional reform in Indian claims processing. H.D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 20* (1990).

48. Newton concludes that contemporary Indian law "grants too much deference to assumed congressional powers and too little weight to Indian rights." Newton, *supra* note 34, at 250.

49. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977).

50. Newton, *supra* note 34, at 245.

51. 448 U.S. 371 (1980). The *Sioux Nation* rule does not allow a federal court to inquire into the adequacy of consideration that an Indian tribe received in compensation for a federal taking of its lands. Instead, an Indian tribe whose lands have been taken by the federal government must overcome the *Sioux Nation*'s good faith test if it is to receive just compensation for its taken lands or resources. Newton, *supra* note 34, at 258-59.

52. The Indian plenary power doctrine permits the federal government to "take" Indian property and give it to others. One constitutional scholar contends that the

Indeed, the *Sioux Nation* decision judicially immunizes the federal government from liability for all but the most heavy-handed and patently self-interested Indian takings.⁵³ The best evidence of this is the “good faith” defense that was offered by the federal government in *Sioux Nation* itself.⁵⁴ The government theorized that, as the trustee of the Sioux peoples, it demonstrably acted in their best interests by agreeing to provide them subsistence rations in perpetuity in exchange for the Indians’ cession of the Black Hills.⁵⁵ This “good faith” exchange arguably immunized the government from any takings liability despite the objective disparity in value between the Black Hills’ resources and the value of the Indian subsistence rations.⁵⁶ The federal government vociferously insisted that its past provision of strategically motivated subsistence rations to the destitute and starving ancestors of today’s Indian claimants immunized it from any financial liability for the unjust taking of the Black Hills in South Dakota.⁵⁷

These decisions mean that the federal government may no longer invoke the “slam dunk” immunity to Indian takings claims that it enjoyed under *Lone Wolf v. Hitchcock*.⁵⁸ But the death of the irrebutable presumption doctrine does little to limit Congress’ retained plenary power over Indian lands. The *Sioux Nation* decision does little to ensure that just compensation is, in fact, paid to those Indian peoples who suffer devastating economic losses due to a federal taking of their

Constitution’s Takings Clause was intended to limit the federal government’s power to confiscate, seize, destroy, or regulate private property. EPSTEIN, *supra* note 15, at 3.

53. Newton wryly concludes that in “less egregious instances of involuntary [Indian] land acquisitions, the plaintiff tribes have rarely been successful.” Newton, *supra* note 34, at 259.

54. *Sioux Nation*, 448 U.S. at 407–17.

55. *Id.* at 416–17.

56. There must be a limit to state coercive power over private property rights because the “creation of [state] monopoly power” over those rights “poses a great danger of abuse.” EPSTEIN, *supra* note 15, at 78. Epstein may have been referring to Native-American landowners when he describes the “prisoners’ dilemma” game that individual landowners face in direct bargaining with a state that seeks to impose “collateral or unrelated” conditions upon their continued use of their private property. Epstein references the doctrine of unconstitutional conditions as a means of restraining state power over otherwise “disorganized citizens” so as to allow them to escape from the socially destructive game. *Id.* at 79.

The Court’s failure to specify an objective yardstick against which to measure the federal government’s assertion that it gave a good faith value for the Indians’ taken land, imposes an “illogical test [that] turns most [Indian land] confiscations into [the] actions of a trustee.” Newton, *supra* note 34, at 261.

57. *Sioux Nation*, 448 U.S. at 420–21. This decision sought to “harmonize” congressional plenary power over Indian affairs with the Fifth Amendment Takings Clause. The Supreme Court attempted to reconcile the federal government’s role as the Indian peoples’ trustee with its sovereign eminent domain power over privately held land. Newton criticizes the failure of that attempted synthesis. This failure stems, she contends, from the “good faith” defense that allows the federal government to subjectively assert that it has “given compensation as a fair equivalent for the land taken, even though it is far less than the land’s fair market value.” Newton, *supra* note 34, at 259.

58. 187 U.S. 553 (1903).

lands.⁵⁹ Its "good faith" standard of judicial review focuses on the wrong end of the just compensation telescope in Indian takings cases. It focuses on the federal government's legitimation of its exercise of plenary power over Indian lands, not on the actual economic losses suffered by those Indian peoples whose lands are taken for a federal purpose.⁶⁰

C. The First Era: Americanizing the European Doctrine of Discovery

Indian occupation of the American West presented a perplexing early nineteenth-century legal challenge. Chief Justice Marshall seized on the 1823 case of *Johnson v. M'Intosh*⁶¹ as the means to resolve the ticklish and potentially dangerous issues that arose from the non-Indians' unruly competition for the control of the western Indian lands. Marshall invoked the European doctrine of discovery as the legal basis for his opinion.⁶² He established an exclusive preemptive right in the federal government to acquire Indian lands as the rightful successor to similar sovereign prerogatives that had been held by Spain, France, and Great Britain.⁶³ But the Indian peoples were deemed by Marshall to retain their inherent right of exclusive use and occupancy of their aboriginal lands until those

59. Newton illustrates this point by hypothesizing a contemporary Indian land sale by Congress on behalf of its Indian wards. Because the federal government fails to conduct a geological survey or obtain competitive bids for these Indian lands, the lands are sold at a price that is three or four times lower than their actual fair market value. She concludes that this congressional action would likely fall short of the blatant and egregious "bad faith" conduct that triggered Fifth Amendment liability in *Sioux Nation*. For that reason, the United States would likely be shielded from fiscal or political accountability for the economically disastrous consequences that befell its Indian wards due to its actions. Newton, *supra* note 34, at 262–63.

60. Newton asks, why should the federal trust relationship immunize the federal government from Indian takings claims? She concludes that the *Sioux Nation* Court's focus on the federal trustee's subjective judgment about the Indian peoples' best interests undervalues and potentially ignores the "real world" economic losses that federal takings impose on the Indian peoples. This decision does little to protect them from the federal government's negligent or uninformed judgments that result in the taking of Indian lands. See *id.* at 263–64. This decision requires the federal judiciary to "abdicate its normal judicial role" in takings cases. *Id.* at 264.

61. 21 U.S. (8 Wheat.) 543 (1823).

62. Historical scholars agree that the Indian peoples' right to "complete sovereignty, as independent nations" was diminished by Marshall's opinion that European "discovery gave exclusive title to those who made it." WASHBURN, *supra* note 17, at 66.

63. Despite Marshall's personal misgivings about the justice of the discovery doctrine, he declared that "if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned." *Johnson*, 21 U.S. (8 Wheat.) at 591.

lands were acquired by the federal government.⁶⁴ The purchase of those lands was to be the preferred means of legitimate federal land acquisition.⁶⁵

Legal commentators understandably emphasize Marshall's practical motives and result-oriented rationale in his opinion.⁶⁶ First, they read *Johnson* as holding that the federal government possesses the exclusive authority to prescribe the terms and conditions for future non-Indian settlement of the western Indian lands.⁶⁷ Second, they read that decision as restricting the Indian peoples' inherent sovereign power to alienate their aboriginal land titles to anyone but the federal government.⁶⁸ They view the Indians' exclusive use and occupancy rights as a temporary accommodation that served primarily to ensure the federal government's paramount ownership over a vast, federalized public domain that would eventually extend to the Pacific Ocean.⁶⁹

But Marshall's accommodation of the Indian peoples' exclusive use and occupancy rights in their lands derived from federal commitments to protect Indian land rights that were embodied in many federal Indian treaties.⁷⁰ It likewise justified the federal government's paternalistic interest in prohibiting unauthorized Indian land transactions by private parties, states, or rival foreign governments.⁷¹ Furthermore, it was the self-executing nature of the European doctrine of discovery that supposedly divested the Indian peoples of their inherent right to freely alienate their lands to anyone but the federal government.⁷² Marshall's accommodation of this doctrine to nineteenth-century American circumstances was arguably intended to serve the complementary interests of the federal government and the Indian peoples.

64. Marshall viewed the Indian peoples as the "rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their discretion." *Id.* at 574.

65. The Indian peoples' "right of possession has never been questioned" by the federal government that has the "exclusive power of acquiring" Indian title. *Id.* at 603.

66. Historian Wilcomb E. Washburn emphasizes Marshall's "practical" appreciation of the "economic and political demands of the millions [of non-Indians]" who populated the continent at the time of his decision. WASHBURN, *supra* note 17, at 66.

67. Professor George C. Coggins views that decision as laying the "legal predicates for the federal [land] disposition program and the westward expansion." GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 49 (3d ed. 1993).

68. *Id.* at 54 (citing FELIX S. COHEN, FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 468-93 (Rennard Strickland ed., 1982)).

69. *Id.*

70. Indians as "original inhabitants" of America were "admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion." *Johnson*, 21 U.S. (8 Wheat.) at 574.

71. Washburn cites the *Johnson* decision as the federal government's basis "for all subsequent determinations of Indian right." WASHBURN, *supra* note 17, at 66.

72. Marshall weighed issues of conscience, expediency, and law in his recasting of what Washburn calls the "natural rights of Indians." *Id.* He reworked the Indians' land rights in terms of the "speculative" rights of the discovering European nations, the "juridical" rights of the successor American states, and the "practical" economic and political demands of those non-Indian settlers that came to populate the American continent. *Id.*

The federal government, through its Indian treaties, defined the evolving boundary line between Indian Country and those lands available for non-Indian settlement. Indian consent not only legitimated the treaty-making process, but was the preferred means for defining Indian Country.⁷³

Indeed, Indian diplomacy resulted in many Indian treaties, including those that confirmed vast roaming and hunting reserves to the powerful Great Plains Indian tribes.⁷⁴ Some view these Indian treaties as a monument to Marshall's Indian

73. President George Washington and War Secretary Henry Knox both emphasized respect for the Indian peoples' aboriginal land titles and rights. President Thomas Jefferson described the federal government's preemptive right in the Indian peoples' lands:

not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a reminder after the extinguishment of a present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy; that the Indians had the full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever.

1 PRUCHA, *supra* note 5, at 59.

Henry Knox echoed that sentiment on pragmatic, moral grounds, writing to President Washington:

that a nation solicitous of establishing its character on the broad basis of justice would...reject every proposition to benefit itself, by the injury of any neighboring community, however contemptible and weak it might be, either with respect to its manners or power.... The Indians being the prior occupants, possess the right to the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war.

Id. 59-60.

Marshall's opinions describe the Indian peoples as independent political entities that despite their status as "domestic dependent nations" were assumed to have retained the power of self-governance over their members and their territories. But Indian reformers after the Civil War began to agitate for the unilateral and coercive extension of federal law and jurisdiction into Indian Country. The Board of Indian Commissioners declared in 1871 that "we owe it to them, and to ourselves, to teach them the majesty of civilized law, and to extend to them its protections against lawlessness among themselves." 2 PRUCHA, *supra* note 5, at 676.

74. The Treaty of Fort Laramie of 1851 was drawn up at one of the most dramatic meetings of Indian peoples and federal treaty negotiators. Some ten thousand Indians—Sioux, Cheyenne, Arapahos, Crows, Assiniboine, Gros Ventres, Mandans, and Arikaras—assembled along the Platte River at Horse Creek, where there was enough pasturage to support such a large gathering of Indian peoples and their horses. Francis Prucha describes the meeting as "slowly paced and formal" as Superintendent Mitchell's comments had to be translated by interpreters on behalf of many tribal nations. Despite some confusion and missteps by the treaty commissioners, the treaty was signed on September 17, just before the federal supply train arrived with goods for distribution to the Indians.

The Indian peoples agreed in the treaty to cease hostilities among the tribal groups and to accept the respective hunting and roaming boundaries declared in the treaty for each of the respective tribal groups. They also agreed to the United States' establishment of roads

law legacy.⁷⁵ But they would later loom as a major impediment to the United States' realization of the late nineteenth-century dream of manifest destiny. The task of empire building required a judicial revision of Marshall's Indian bargaining model. Only by fundamentally reformulating that model could Marshall's opinions be made to serve the national imperatives of rapid western settlement and development. In reformulating its inherited model, the Court unleashed the much criticized, but never repudiated, congressional plenary power doctrine to take Indian lands.⁷⁶

Marshall's opinions provided the context for the later judicial reformulation of the Indian bargaining model.⁷⁷

D. The Second Era: The Indian Peoples' Descent from Sovereign to Wardship Status

Indian treaties inextricably bound the Indian peoples and federal government together in a land-based relationship.⁷⁸ The treaties committed the federal government to protect the Indians' exclusive use and occupancy rights from infringement by increasingly raucous and numerous non-Indian settlers who clamored for the opening of the Indian-owned western lands.⁷⁹ But federal Indian policy became inexorably driven by the late nineteenth-century notion of an American manifest destiny to acquire and settle all of the western lands to the Pacific Ocean.⁸⁰

The Indian Country concept had assumed that sufficient land was available on America's western frontier to accommodate the Indians' and non-Indians' settlement needs. By the 1830s, the eastern Indian tribes had already been

and military outposts in Indian Country, and to pay restitution for wrongs committed against non-Indians who lawfully passed through their lands. The federal government, in return, agreed to protect the Indian peoples from non-Indian depredations and to pay annuities of \$50,000 annually. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 238–39 (1994).

75. Charles Wilkinson characterizes these treaties and the resulting reservation system as "intended to establish tribal homelands for the tribes, islands of tribalism largely free from interference by non-Indians or future state governments." CHARLES WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 14 (1987).

76. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); see also PRUCHA, *supra* note 74, at 356.

77. The Indian peoples did not possess "complete sovereignty" over their territories because their status had been diminished by "the original fundamental principle that discovery gave exclusive title to those who made it." WASHBURN, *supra* note 17, at 66.

78. See CORNELL, *supra* note 4, at 34–38; *supra* note 9.

79. Congress originally sought to define and maintain a meaningful boundary around Indian Country for a variety of practical reasons. For this reason, Congress asserted, under various Indian trade and intercourse acts, regulatory jurisdiction over non-Indians who intruded into Indian Country or sought to purchase Indian lands. *Id.* at 47.

80. William Gilpin wrote in 1846 of the American people's "untransacted destiny...to subdue the continent—to rush over this vast field to the Pacific Ocean...to establish a new order in human affairs." *Id.* at 38. But between Gilpin and the Pacific Ocean lay many Indian peoples who were willing to fight to preserve their land and territory. *Id.*

compelled to cede their lands east of the Mississippi and remove to an Indian Territory west of the Mississippi. President Jackson convinced himself and others that this Indian removal strategy could be a cornerstone of Indian policy.⁸¹ Indian peoples could always be removed farther west to arguably equivalent and conveniently distant western lands.⁸²

Indian bargains could be fairly revised so as to accommodate emerging non-Indian settlement needs.⁸³ This simple faith in a boundless western frontier made easy those treaty promises that the Indian peoples would retain their lands for as “long as the grass is green and the rivers flow.”⁸⁴ But by the 1870s, this convenient view had proven a disastrous failure. Non-Indian settlement of western lands proceeded at such a breathless pace after the Civil War as to make nonsense of any future Indian bargaining strategy.⁸⁵

81. Removal of the eastern Indian peoples had been a central concern of federal policy makers since the War of 1812. President Jackson's warning in 1830 to the Chickasaws to either emigrate or submit to state law served to formalize the Indian removal idea as policy. *Id.* at 47–48.

82. The concept of a permanent Indian Country contemplated a secure western territory for the resident Indian peoples in which federally sponsored programs of acculturation and education would have sufficient time to transform many of the Indian peoples into civilized and acceptable neighbors. PRUCHA, *supra* note 74, at 235–36.

83. The earlier acquisition of the Louisiana Purchase in 1803 allowed President Andrew Jackson to implement the Indian removal policy on a large scale in the 1830s. President Jefferson had earlier suggested that the eastern Indian peoples could be granted western lands in exchange for their aboriginal lands that lay east of the Mississippi River. President Jefferson's notion of a western geographic expanse vaguely called “Indian Territory” took concrete shape by the 1860s when many of the eastern Indian peoples had been relocated into a concentrated area now known as Oklahoma. CORNELL, *supra* note 4, at 42.

The westward removal of the eastern Indian peoples during the 1830s served a variety of goals held by the early federal Indian policy makers. It quickly cleared Indian lands for non-Indian settlement. It effectively insulated the removed Indian peoples from a proximate, unhealthy and conflict-ridden contact with non-Indian frontiersmen. Cornell emphasizes that the federal government's Indian policy goal was both the progressive extinction of Indian land title and the displacement of Indian cultures with non-Indian values and norms. *Id.* at 40–41.

84. Wilkinson cites promises by treaty commissioners that the Indian peoples would possess their reservations as “permanent home[s] from which there will be no danger of your moving again.” WILKINSON, *supra* note 75, at 17.

85. Indian removal and assimilation policies were fused in 1887 by the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358, 381 (1994)). It authorized the president to allot communally held Indian lands in severalty as among the members of the respective resident Indian peoples. Indian heads of households would generally receive 160-acre parcels and single Indian individuals or children would receive smaller parcels of tribal land. Allotted lands were originally to be held in federal trust for twenty-five years for the individual allottees. But Indian lands that were deemed surplus to the allotment requirements of a specific reservation could be put up for sale by the president to non-Indian settlers with the sales proceeds being placed in Treasury accounts for the benefit of the affected Indian people. CORNELL, *supra* note 4, at 42–43.

Sovereign bargains can be enforced only through legally binding proceedings or at gunpoint.⁸⁶ The Indian peoples, unable and unwilling to once again accommodate the federal government's land cession demands, engaged in a lengthy, but ultimately futile, military defense of their roaming and hunting reserves.⁸⁷ The Indian peoples' resort to the gun ended with the ignominious 1890 massacre by federal cavalry of Big Foot's ragtag band of a few Sioux warriors and many women, children, and old men.⁸⁸

The Indian peoples' resort to the federal courts to enforce their sovereign bargains came in *Lone Wolf*.⁸⁹ The Comanches and Kiowas sued for an injunction to prevent the federal allotment and sale of their treaty reserved lands in contravention of the Indian consent provisions of the 1867 Treaty of Medicine Lodge Creek.⁹⁰

Congress decided in 1871 to repudiate future Indian treaty making. Some non-Indians wanted Congress to go further and repudiate all existing Indian treaties.⁹¹ But the 1871 statute only prohibited the president from future negotiation

86. Marshall's Indian bargaining model presumed that later revision of the Indian peoples' territorial rights would come through good faith bargaining that was reasonably free of federal coercion, threat, or unfair inducements to obtain the Indians' consent to future land cessions. But federal Indian policy soon deviated from this standard by countenancing treaty negotiation practices that bordered on the coercive, if not downright fraudulent. CORNELL, *supra* note 4, at 45-50.

87. Custer's defeat by the combined forces of Sioux and Cheyenne warriors on June 26, 1876, at the Little Bighorn effectively bookends Stephen Cornell's Indian conflict era, which stretched from the late eighteenth to late nineteenth centuries. *Id.* at 14.

88. A small Sioux band of some 100 Indian warriors and 250 women and children surrendered near the South Dakota Badlands to troops of the Seventh Cavalry on December 28, 1890. These Indians were surrounded, as they camped near Wounded Knee Creek, by 500 soldiers and several pieces of Hotchkiss light artillery. Apparently, the frightened soldiers searched the Indian camp for firearms the next morning and a scuffle ensued in which an Indian warrior fired a gun. Both Indians and soldiers exchanged fire and the non-Indian commander ordered the firing of the Hotchkiss artillery at the fleeing Indian women and children as they retreated into a ravine near the camp. The Indian bodies would eventually stretch for miles as some 200 Sioux Indians were killed by the federal troops. *Id.* at 3.

The military subjugation of the Apaches, Sioux, and Nez Perce by the federal cavalry in the 1870s marked the effective end of armed Indian resistance on the Great Plains and Far West. The collapse of Indian military might left the Indian peoples vulnerable to retributive congressional action and the pressures of treaty negotiators. Cornell cites the words of Shoshone Chief Washakie in 1878 as the closing elegy of this era: "Our fathers were steadily driven out, or killed, and we, their sons, but sorry remnants of tribes once mighty, are cornered in little spots of the earth all ours by right—cornered like guilty prisoners and watched by men with guns." *Id.* at 50.

89. 187 U.S. 553 (1903).

90. Lone Wolf's attorney, William C. Springer, filed an injunction action against Interior Secretary Hitchcock on June 6, 1900, in the equity division of the Supreme Court for the District of Columbia, alleging that the allotment and sale of the Indians' land violated their due process rights. BLUE CLARK, *LONE WOLF v. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY* 62-63 (1994).

91. Termination of Indian treaty making, Indian reformers believed, would allow

or execution of treaties with the Indian tribes.⁹² Congress expressly declined to abrogate the many Indian treaties negotiated by the president and ratified by the Senate before 1871.⁹³ Several of these treaties allocated vast tracts of hunting and roaming lands to powerful Great Plains Indian tribes.⁹⁴ Further, those treaties required that at least a majority of the adult male members of the tribes consent to any future cession of their lands to the federal government.⁹⁵

Congress avoided the wholesale abrogation of existing Indian bargains, but the Supreme Court was directly confronted with the abrogation issue in *Lone Wolf*.⁹⁶ It had to decide whether the Kiowas and Comanche Indians could prevent the federal government from allotting their reservation and selling the so-called surplus tribal lands to non-Indian settlers in violation of the Indian consent provisions of the 1867 Treaty of Medicine Lodge Creek.⁹⁷ Indian treaties—such as the Medicine Lodge Creek Treaty—had long legitimated the federal acquisition of Indian lands.⁹⁸ Such Indian land agreements were portrayed as the outcome of mutually beneficial arms-length negotiations between the federal government and the affected Indian peoples.⁹⁹

individual Indians to be integrated into white society via a stringent educational program and the extension of private property rights into Indian lands. WASHBURN, *supra* note 17, at 73.

92. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1994)).

93. Existing Indian treaties are expressly preserved by the statute's terms. WILKINSON, *supra* note 75, at 138 n.3.

94. The 1851 Treaty of Fort Laramie, 11 Stat. 749 (1859), with the Sioux, Cheyennes, Arapaho, Crow, Assiniboin, Gros Ventres, Mandans, and Arikaras spelled out the hunting and roaming boundaries for each signatory tribe. But Prucha emphasizes that it was the Sioux, along with their Cheyenne and Arapaho allies, who "dominated the conference" and achieved federal acknowledgment of their "power" and effectively allowed them to dominate the reserved hunting grounds. 1 PRUCHA, *supra* note 5, at 343.

95. See, for example, Article 12 of the 1867 Treaty of Medicine Lodge Creek with the Kiowa and Comanche peoples, which stated that "[n]o treaty for the cession of any portion or part of the reservation herein described...shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same." Treaty with the Kiowa and Comanche Tribes of Indians (Treaty of Medicine Lodge Creek), Oct. 1, 1867, art. 12, 15 Stat. 581, 585.

96. 187 U.S. 553 (1903).

97. Art. 12, 15 Stat. at 585. Clark reports that "[f]riends of the Indian approached the court appeal buoyed with an air of positive anticipation [because] never before had the executive, legislative or judicial branches seized Indian property and thrown it open without at least the tacit consent of the Indians." CLARK, *supra* note 90, at 67. They were hopeful that the judiciary would enforce Article 12 of the 1867 Medicine Lodge Treaty after Congress ratified the Jerome Commission agreement for the Indians' cession of their reserved lands, even though far fewer than the required number of Kiowas and Comanches had consented to that agreement. See Act of June 6, 1900, ch. 813, 31 Stat. 676. This disregard of the Indians' treaty-guaranteed property rights was the basis for the suit of Lone Wolf, a Kiowa Indian, to enjoin Interior Secretary Hitchcock from implementing that act on his reservation. CLARK, *supra* note 90, at 67–76.

98. CLARK, *supra* note 90, at 99.

99. The *Lone Wolf* decision stripped away the Indian reformers' delusion that the

But Congress' 1871 decision to abandon Indian treaty making presented the Supreme Court with a dilemma. The Court had two options in *Lone Wolf*.¹⁰⁰ It could accept Lone Wolf's argument that the Indian consent requirement bound Congress and prevented the coerced allotment of their reservation. That provision required that at least three-fourths of the adult male members of the tribes consent to any future tribal land cessions to the federal government.¹⁰¹ It had been inserted in the 1867 treaty to specifically reassure those Indians who wanted a federal guarantee of their future, undisturbed use and occupancy of their reserved lands.¹⁰² But stringent judicial enforcement of this and similar Indian consent provisions would likely throttle any envisioned federal opening of the vast western Indian lands subject to similar treaty provisions.¹⁰³ Alternatively, it could decide that Congress was morally, but not legally, bound to respect its Indian bargains. Only by fundamentally reformulating Marshall's Indian bargaining model could the Court sustain Congress' coerced allotment and sale of Indian lands in defiance of its treaty commitments.¹⁰⁴

The federal government was freed from its treaty promises by the Court's redefinition of the relationship between the Indian peoples and the federal government.¹⁰⁵ The Court seized on Marshall's early dictum in *Cherokee Nation v.*

Indian peoples enjoyed the unqualified ownership of their treaty-reserved lands. Congress, thereafter, proceeded with the opening of many treaty-established Indian reservations. 2 PRUCHA, *supra* note 5, at 775-76.

100. Lone Wolf argued that Indian consent to the Jerome Agreement had been procured by misrepresentation or threat and that, in any case, fewer than the required three-fourths of the adult male members had signed the agreement. The Court's possible acceptance of this due process argument represented option one. Alternatively, the Court could choose to reformulate Marshall's Indian bargaining model so as to allow Congress to exercise plenary power over the Indian peoples' lands and resources. PRUCHA, *supra* note 74, at 355-60.

101. Article 12 of that treaty provided that:

No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III of this treaty.

Art. 12, 15 Stat. 581.

102. Kiowa warriors such as Satanta were opposed to the reservation system. He asserted that when Indians "settle down, we grow pale and die." CLARK, *supra* note 90, at 24. These warriors much preferred a life of freedom. The treaty negotiators held out the prospect of "gifts, annuities, [and] houses" as inducements to these warriors to agree to this treaty. *Id.*

103. *Id.*

104. The new *Lone Wolf* doctrine conceived of the Indian peoples as governmental "wards [to be] confined on Indian reservations, with the power and dignity of independent nations supported by treaty guarantees all but forgotten." PRUCHA, *supra* note 74, at 358.

105. *Id.*

Georgia.¹⁰⁶ Marshall had casually analogized the relationship of the federal government and the Indian peoples as like that of a guardian and its wards.¹⁰⁷ But the Court in *Lone Wolf* transformed this casual analogy into a sweeping doctrine of federal plenary power over Indian affairs. The repercussions of the *Lone Wolf* doctrine for the Indians' land base were deep and long lasting. It swept away any legal impediment to the coerced allotment and sale of Indian lands to non-Indian interests. The short- and long-term effects of this decision on the Indians' land base have been devastating. Between ninety and one-hundred million acres of Indian lands were lost to Indian ownership.¹⁰⁸

The *Lone Wolf* decision drove a stake through the heart of Indian consent doctrine. Presumed congressional good faith in its Indian dealings, not Indian consent, would govern future Indian land cessions to the federal government. Furthermore, Congress was judicially authorized to take Indian lands incident to its exercise of guardianship power over the Indian peoples. The Court's action unleashed the federal government's forced Indian assimilation program that was aimed at the systematic dismantling of traditional tribal governance and cultural systems.¹⁰⁹

The *Lone Wolf* decision authorizing the congressional allotment and sale of the Indian peoples' treaty-reserved lands and birthing the federal plenary power doctrine represents the second era of Marshall's Indian law legacy.¹¹⁰

E. The Third Era: Judicial Indecision Regarding the Compensability of Indian Title

The demolition of the Indian consent principle signaled a low point for the Indian peoples.¹¹¹ However, the Indian peoples and their advocates did not give up

106. 30 U.S. (5 Pet.) 1 (1831).

107. *Id.* at 17.

108. Congress' 1887 allotment program fused earlier disparate Indian removal and assimilation policies in a dramatic and global manner. Between 1887 and 1934, when Congress officially repudiated its allotment program, some 60% of the remaining Indian land base—more than 86 million acres—had passed into non-Indian hands. These lands were transferred from Indian ownership through a variety of means. Much of those lands were directly sold to non-Indians under the federal surplus lands acts. Some of those lands were lost to Indian ownership through amendments to the Allotment Act that allowed individual Indians to sell or encumber their lands as a means of obtaining some income for subsistence needs on the new and substantially diminished Indian reservations of the twentieth century. CORNELL, *supra* note 4, at 44–45.

109. Professor Getches suggests that the Indian plenary power doctrine grew out of three basic assumptions: first, strict adherence to the terms of Indian treaties would have distributed an unfair share of the nation's wealth to Indians; second, federal courts declined the role of enforcing arguably imprecise treaty terms; and third, the Indian plenary power doctrine preserves federal flexibility to adapt Indian policy in light of fundamentally changed circumstances. GETCHES ET AL., *supra* note 10, at 208.

110. Indian allotment served as the characteristic dispossession device of the "reservation era," dating from the late nineteenth century to the 1930s. CORNELL, *supra* note 4, at 42–43.

111. Allotment marked the beginning of a new process of incorporation of Indian

hope of somehow protecting their lands from federal takings.¹¹² Did *Lone Wolf* absolutely immunize the federal government from Indian takings claims? This issue was squarely presented to the Supreme Court in the 1938 case of *Shoshone Tribe v. United States*.¹¹³ In *Shoshone*, the Court upheld the lower court's judgment that awarded just compensation to the Shoshone Indians for Congress' late nineteenth-century decision to settle another Indian tribe, over the Shoshone's vehement objection, on those lands reserved for the exclusive use and occupancy of the Shoshone Tribe.¹¹⁴ That decision heartened Indian peoples.¹¹⁵ The Court seemed poised to overrule its 1903 *Lone Wolf* decision.¹¹⁶ Did the *Shoshone* decision really establish a per se Indian just compensation rule? Was the federal government required to pay just compensation to injured Indian peoples when it took their lands for federal purposes?¹¹⁷

Any hope for a broad-gauged Indian takings doctrine was soon derailed. One factor in this derailment was Congress' creation in 1946 of the Indian Claims Commission ("ICC").¹¹⁸ The ICC was to hear and determine all those jurisdictionally defined claims for relief that the Indian peoples may have against the United States.¹¹⁹ The ICC's creation, coupled with the Supreme Court's 1955 decision in *Tee-Hit-Ton Band of Indians v. United States*, doomed any easy optimism.¹²⁰ *Tee-Hit-Ton* dashed the Indians' hopes of realizing Fifth Amendment protection of their aboriginal use and occupancy rights. That case reinterpreted *Johnson* so as to restore the *Lone Wolf* doctrine that courts must defer to Congress' plenary power over Indian lands.¹²¹

lands into the surrounding American economy. The Indian peoples' descent under the federal plenary power doctrine from their historic status as semisovereign nation to dependent ward mirrors their cultural and economic subordination by assimilative and antitribal programs of the late nineteenth and early twentieth century. *Id.* at 44-50.

112. Professor Nell Newton contends that extending generally the just compensation principle to Indian lands "would strike a fair balance between the competing interests of federal power and Indian rights." Newton, *supra* note 34, at 264.

113. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

114. Because the Shoshone Tribe held a federally recognized right of occupancy in their lands, Congress' exercise of eminent domain to transfer them to the use and occupancy of another Indian tribe required the payment of just compensation to the wronged Indian tribe. *Id.* at 115.

115. Governmental interference with Indian lands, not the scope of title held by the Indians, has been regarded by some commentators as the Indians' "key to recovery" in the *Shoshone* decision. Daniel G. Kelly, Jr., *Indian Title: The Right of American Indians in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 666 (1975).

116. *Id.* at 668.

117. *Id.*

118. Indian Claims Commission Act, ch. 959, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v-3). The Indian Claims Commission terminated on September 30, 1978, by the terms of 25 U.S.C. § 70v.

119. President Truman signed the ICC legislation to allow the "First Americans" the opportunity to "vindicate their property rights and contracts in the courts against the violations of the federal government itself." ROSENTHAL, *supra* note 47, at 92.

120. 348 U.S. 272 (1955).

121. *Id.* at 290-91.

The Court's failure in *Tee-Hit-Ton* to circumscribe the federal plenary power doctrine by extending just compensation protection to the Indian peoples' aboriginal use and occupancy rights represents the third era of Marshall's Indian law legacy.¹²²

F. The Final Era: Reexamining the 1949 Taking of the Fort Berthold Indian Reservation

In 1949, Congress took 156,035 acres of Indian lands located within the Fort Berthold Indian Reservation as the site for a massive multipurpose water resource development project known as the Pick-Sloan Program.¹²³ The Fort Berthold Indians' impassioned, but ultimately futile, struggle to preserve their historic reservation demonstrates the contemporary impact of Marshall's Indian bargaining model. As will be demonstrated in Part V, the clash between the Fort Berthold Indians and the combined forces of the Army Corps of Engineers and two powerful congressional Indian committees starkly illustrates the need for a modern Indian takings doctrine.¹²⁴ Extending just compensation protection to the remaining Indian lands would require no heroic innovations in existing legal doctrine or practice. The 1949 Fort Berthold taking reveals the deep disadvantages faced by contemporary Indian peoples who must bargain with the federal government to preserve their unique land-based tribal cultures and economies.¹²⁵

II. THE FIRST ERA: AMERICANIZING THE EUROPEAN DOCTRINE OF DISCOVERY

A. The Prologue to Johnson v. M'Intosh

Sovereign bargaining between the federal government and the Indian peoples would be unthinkable absent Marshall's 1823 opinion in *Johnson v. M'Intosh*.¹²⁶ He created the needed bargaining framework via the concept of Indian title.¹²⁷ By federalizing Indian land titles he established Congress as the exclusive dealer in Indian lands. Three foundational principles were declared by the *Johnson* decision: First, only the federal government may acquire Indian lands by purchase or conquest. Second, only the federal government may grant Indian lands, subject

122. From a constitutional standpoint, Professor Newton contends that there is no defensible reason "for treating Indian property different from non-Indian property." Newton, *supra* note 34, at 264. She concludes that shielding the federal government from potentially large Indian takings claims should not be deemed an overriding governmental interest that shields the federal government from liability in these cases. *Id.*

123. Flood Control Act of 1944, ch. 664, Pub. L. No. 78-534, 58 Stat. 887, 897-98 (codified as amended at scattered sections of 16 U.S.C., 33 U.S.C., 43 U.S.C.).

124. See Meyer, *supra* note 45.

125. *Id.*

126. 21 U.S. (8 Wheat.) 543 (1823).

127. *Id.* at 574.

to their right of use and occupancy. Third, only the Indian people have the right to use and occupy their lands, subject to future federal divestment of those rights.¹²⁸

The commodification of Indian lands reflected the nineteenth century's changed valuation of the western lands. Increasing scarcity of available lands for non-Indian settlement prompted states and private land syndicates to acquire vast tracts of land directly from the Indian peoples. Avoiding needless bloodshed and conflict between the encroaching settlers and those Indians who would fight to protect their remaining lands was the goal of early federal Indian policy makers.¹²⁹

Congress in 1790 had asserted its regulatory authority over Indian lands by enacting its first Indian Trade and Intercourse Act.¹³⁰ But its meaningful enforcement was a problematic affair along the volatile frontier of Indian Country. Although federal regulations prohibited the unauthorized acquisition of Indian lands, private land speculators and states' rights advocates openly defied Congress' assertion of an exclusive police power over these resources.¹³¹ Indeed, similar initiatives by the British Crown to restrict private commercial intercourse with the Indians had prompted widespread evasion by rebellious colonial interests. Frontiersmen and private land-speculation syndicates likewise greeted the federal government's feeble efforts to protect the Indian lands with disdain. They openly challenged the federal government's authority to restrict their asserted natural liberty to acquire land directly from the Indian peoples.¹³²

128. GETCHES ET AL., *supra* note 10, at 78.

129. The federal government sought to establish a boundary around Indian Country via Indian treaties and the assertion of regulatory jurisdiction over Indian land and commercial transactions under the 1790 Trade and Intercourse Act. This federal regulatory effort was directed at restraining private and state efforts to dispossess the Indian peoples of their lands. CORNELL, *supra* note 4, at 47.

130. President Andrew Jackson's efforts to remove the Five Civilized Tribes—the Cherokees, Creeks, Chickasaws, Choctaws, and Seminoles—from their lands in the southeastern United States helped to undermine the federal government's commitment to protecting Indian lands. *Id.*

131. The 1796 version of the Indian Trade and Intercourse Act specified a discrete boundary line between the whites and Indians. Indian Trade and Intercourse Act, 1 Stat. 469, 469 (1796). Prucha points to this as the first such formal statutory designation of Indian Country. Despite frontiersmen dissatisfaction with a law that intended to frustrate their direct dealings with, or depredations upon, the Indians, Congress reenacted the statute in 1799 without amendment and with little debate. Apparently, Congress valued the friendship and pacification of its Indian allies more than it feared the outrage of those frontiersmen who felt they were deprived of their settlement opportunities or natural liberties by Congress' high-handed treatment of its own citizenry. 1 PRUCHA, *supra* note 5, at 92–93.

132. Enforcement of the Indian Trade and Intercourse Act in frontier America of the early nineteenth century proved well-nigh impossible. The American frontier had spawned a subculture of a breed of lawless, sometimes depraved, men who lived off clandestine intercourse with the Indians. The Indian fur trade literally created these men who went off with their packs for months on end into the wilderness. Prucha emphasizes that though they often took Indian wives, they nonetheless “mercilessly exploited the Indians, debauched them with whiskey, and then robbed them of their furs.” 1 PRUCHA, *supra* note 5, at 95. They totally disregarded legalities, and their well-heeled capitalist

B. The Devolution of Original Indian Title

Sovereign bargaining via Indian treaty making had arguably served the European nations' need for exclusive control over Indian lands.¹³³ Marshall assumed that it could also serve that same goal on behalf of the federal government.¹³⁴ Curbing non-Indian incursions into Indian lands was also an important goal of the early federal government.¹³⁵ Such bitter land-related conflicts helped convince the framers of the Constitution that an unregulated Indian commerce was unwise and dangerous. Constitutional responsibility for regulating Indian commerce was explicitly assigned to the federal government by the 1787 Constitutional Convention.¹³⁶

But a major practical issue was left undecided: who held legal title to the western Indian lands? Whoever held that title would control the destiny of non-Indian western settlement. Marshall recognized that the peculiar facts and issues presented in *Johnson* offered the Court an opportunity to domesticate Indian title in a manner favorable to the federal government.¹³⁷

Johnson involved private land transactions with Indian tribes in 1773 and 1775, prior to the United States' existence.¹³⁸ The Court's ostensible task in *Johnson* was to determine which of the two competing private claimants had the better title to a large tract of former Indian lands in the Ohio Valley.¹³⁹ One of the non-Indian claimants traced his land title to private land purchases in 1773 and 1775 directly from the chiefs or headmen of the Illinois and Piankeshaw Indians.¹⁴⁰ The other non-Indian claimant traced his land titles to a later federal grant of those

masters, such as John Jacob Astor of the American Fur Company, sought legislative relief against overstrong enforcement of federal Indian treaties and the various federal protective statutes. *Id.*

133. *Id.* at 113–14. Marshall's Indian law decisions laid the legal basis for such federal regulation of Indian Country by declaring the principles of federal preemption over Indian lands and tribal sovereignty. Prucha reads these decisions as establishing the federal government's exclusive power to extinguish the Indian peoples' aboriginal rights of occupancy in their lands. But the federal government was interested in exercising its legal power to protect Indian land rights only up to a point. The federal government's main interest was in policing the process of non-Indian settlement of Indian lands so as to ensure that it was achieved with as little disorder and bloodshed as possible. Indeed, the notion of Indian removal far west of the Mississippi convinced some Indian policy makers that they could forever defer the problem of non-Indian encroachment on Indian Country. *Id.*

134. *Id.*

135. *Id.* at 108–14.

136. The new Constitution vested exclusive authority in Congress to regulate trade and commerce and make treaties with the Indian peoples. This was a "far simpler and clearer" declaration of federal legislative authority over Indian affairs than had been contained in the superseded Articles of Confederation. GETCHES ET AL., *supra* note 10, at 70–71.

137. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 710–11 (1991).

138. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 571–72 (1823).

139. *Id.* at 572.

140. *Id.* at 543–71.

lands that was subsequent to a land cession agreement between the federal government and those same Indians.¹⁴¹

Marshall seized the opportunity to address the broader question of who had the power to grant "good title" to Indian lands—the federal government or the respective Indian peoples?¹⁴² By a creative interweaving of sixteenth-century European notions of sovereignty over "heathen and infidel peoples" with the practical necessity for the orderly western settlement, Marshall established the federal government's paramount title to Indian lands.¹⁴³ Based on the European sovereigns' preemptive rights over Indian lands, he concluded that only the federal government could grant "good title" to former Indian lands.¹⁴⁴ Despite Marshall's personal doubt that the Pope or the European monarchs possessed any such power to grant Indian lands to their colonizing expeditions or chartered companies,¹⁴⁵ he nonetheless concluded that the American courts were bound by established European law and custom to recognize the federal government's power over Indian lands.¹⁴⁶

The de facto success of the Europeans in incorporating the Indian lands into their respective domestic system of property rights established, for Marshall, a judicially unassailable "actual state of things."¹⁴⁷ By Marshall's "velvet revolution," the United States acceded to paramount title over Indian lands, without resort to a gruesome and expensive war of conquest against fierce tribal opponents who would fight rather than surrender their lands to non-Indians.¹⁴⁸

But Marshall was required to tweak the discovery doctrine to adapt it to American circumstances.¹⁴⁹ Marshall's moral disquiet about the seeming

141. *Id.* at 571–72.

142. *Id.* at 572–73.

143. *Id.* at 591.

144. *Id.* at 587–92.

145. *Id.* at 590–91.

146. The discovering European nations had the "sole right of acquiring the soil from the natives, and establishing settlements upon it." *Id.* at 573. The United States likewise "maintained, that discovery gave an exclusive right to extinguish Indian title of occupancy, either by purchase or conquest." *Id.* at 587.

147. Marshall reasoned that the British Crown had successfully asserted its "limited sovereignty over [the Indian peoples], and the exclusive right of extinguishing the title which occupancy gave them." *Id.* at 588. This sovereignty and preemptive right over the Indians' land passed to the United States after its successful revolution against British authority in 1783.

148. The discovery doctrine, however much it "may be opposed to natural right, and to the usages of civilized nations," is yet "indispensable to that system under which [the United States] has been settled." *Id.* at 591.

149. Marshall's task in *Johnson* was to:

consider not only law but conscience and expediency as well. The "natural" rights of the Indians had to be seen in terms of the "speculative" rights of the earlier European monarchs, the "juridical" rights of their successor American states, and the "practical" economic and political demands of the millions who now populated the continent.

WASHBURN, *supra* note 17, at 66.

dispossession of the Indian peoples may have prompted his action.¹⁵⁰ Judicial confiscation of the Indians' aboriginal land titles was arguably allowed by the European doctrine of discovery. But he had also to elide a delicate public relations problem: such dispossession would have outraged international public opinion and led to the condemnation of his new nation.¹⁵¹

Marshall could not confirm the Indian peoples' inherent authority to alienate their lands to whomever they wished. That decision would have frustrated the revenue raising capability and expansionist ambitions of the federal government.¹⁵² He avoided this dilemma by legally bifurcating the Indian peoples' land titles into two federally recognized property interests.¹⁵³ The Indians, as first possessors of the soil, held the right of exclusive use and occupancy in their aboriginal lands. This possessory right was declared to be as legally sacred as the Anglo-American right of fee ownership.¹⁵⁴ However, the United States, as the sovereign successor in interest to the European discovering nations, held the paramount fee simple title to the Indians' lands.¹⁵⁵

This bifurcation of Indian title both justified and necessitated a land-based relationship between the federal government and the Indian peoples. Doubtless, the Indian peoples would have charged, if they had been consulted, that the *Johnson* decision wrongfully impaired their preexisting sovereign authority over their lands. They lost their inherent right to sell or alienate their lands to anyone but the federal government.¹⁵⁶ Doubtless, the non-Indian settlers and speculators, if they had likewise been consulted, would have charged that the *Johnson* decision ignored

150. Washburn characterizes Marshall's opinion as balancing "conscience and expediency" in justifying what may be regarded as his dispossession of the Indians' "natural right" to the full ownership of those lands they had occupied from time immemorial. *Id.*

151. G. Edward White described Marshall's difficulty as arising from distinct legal principles that apply to the Indian peoples:

The Indians had been the initial possessors of the American continent: the land and, presumably, the property rights emanating from it were theirs.... The Indian tribes had been recognized from the outset of white settlement as nations and had entered into legal relationships, such as treaties or contracts, with whites. Theoretically, then, Indian tribes holding land had not only rights of sovereignty but a bundle of natural rights deserving of legal recognition, rights related to the concepts of liberty, property, and self-determination that occupied so exalted a position in early-nineteenth-century jurisprudence.

WHITE, *supra* note 137, at 704.

152. But the availability of this land and resources for American expansion "was dependent on the dispossession of the original inhabitants." CORNELL, *supra* note 4, at 35.

153. *Johnson*, 21 U.S. (8 Wheat.) at 591-94.

154. *Id.*

155. Marshall's message in *Johnson* to the Indian peoples was that "the natural rights of human beings to dispose of property that they held by virtue of possession did not apply to Indians in America." WHITE, *supra* note 137, at 710.

156. The natural law idea was reduced in *Johnson* to an "advisory capacity." White concludes that the Indians' inherent right to dispose of property had been subordinated to the "positive enactments of American states and the federal government." *Id.* at 710-11.

their God-given natural liberty to acquire lands from the Indians. Furthermore, the Indian peoples, private land dealers, and state rights advocates would have protested the judicially created and exclusive power of the federal government to prescribe those terms and conditions by which private parties would hereinafter acquire title to western Indian lands.¹⁵⁷ Few of the now innumerable grantees of federal land titles know or care that the Indian peoples had originally granted those lands to the United States.¹⁵⁸

C. Marshall's Creation of an American "Charter of Discovery"

Marshall extolled the sacredness of the Indian peoples' use and occupancy rights in their aboriginal lands.¹⁵⁹ To some this seems mere judicial sugarcoating that shrouds a culturally biased taking of Indian lands.¹⁶⁰ But contemporary efforts

157. Theorizing about the Indian rights played little role in the thinking of the non-Indian settler or the eastern Indian land speculator. Prucha remarks that "they saw the rich lands of the Indians and they wanted them." 1 PRUCHA, *supra* note 5, at 108. John Sevier's natural liberties philosophy served to legitimate the aggressive attitudes of the frontiersmen. He argued that the "law of nations...agree[s] that no people shall be entitled to more land than they can cultivate." *Id.* His frontiersman's philosophy triumphed because the federal government could make only sporadic and relatively feeble military efforts to regulate this non-Indian pressure to settle Indian lands. *Id.* at 111-12.

158. The incorporation of the Indian lands into the American property system was essential for the realization of nineteenth-century visions of America's destiny. Thomas Jefferson, as champion of the social agrarian movement, promoted the commercialization and appropriation of western Indian lands as the basis for founding an independent-minded "yeoman" class of free-holder farmers. By contrast, William Gilpin focused in 1846 on the idea of progress and manifest destiny when he wrote: "The untransacted destiny of the American people is to subdue the continent—to rush over this vast field to the Pacific Ocean...to establish a new order in human affairs." CORNELL, *supra* note 4, at 37-38. Common to both of these visions is the need to incorporate the Indian lands as a commodity for future federal disposition.

159. The United States government treated the Indian peoples as if they were autonomous foreign nations. Marshall concluded that this treaty-making history confirmed an "autonomous nationhood" for Indian peoples. But Marshall could not recognize that the Indian peoples retained full sovereignty over their aboriginal lands. *Id.* at 57-58.

The qualified character of Indian sovereignty over their aboriginal lands is evidenced in Jefferson's proposed constitutional amendment that would have authorized the federal government's acquisition of the Louisiana Territory from France in 1803. Although he proposed a recognition of Indian land rights, he limited that recognition to an exclusive right of occupancy in their aboriginal lands. The proposed language read:

The right of occupancy in the soil, and of self-government, are confirmed to the Indian inhabitants, as they now exist. Preemption only of the portions rightfully occupied by them, & a succession to the occupancy of such as they may abandon, with the full rights of possession as well as of property & sovereignty in whatever is not or shall cease to be so rightfully occupied by them shall belong to the U.S.

Id. at 59.

160. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 308-17 (1990).

to mitigate or prevent the federal taking of Indian lands require a critical revaluation of Marshall's Indian bargaining model.

This analysis focuses on two elements: (1) Marshall's adoption of a conflated notion of European sovereignty over the "heathen and infidel" peoples of the New World;¹⁶¹ and (2) Justice Reed's later revision of the *Johnson* decision in holding that the Indians' aboriginal use and occupancy rights are not compensable property interests.¹⁶² The federal government may take aboriginal use and occupancy rights without any payment of judicially mandated compensation.¹⁶³

But Reed's opinion confounds *Johnson* and extends it beyond its facts and rationale. By the time of Justice Reed's opinion in 1955, the West had long been settled.¹⁶⁴ Doubtless *Johnson* foreclosed Indian land claims by foreign governments, private parties, or states that were based solely on ostensible agreements with Indian tribes.¹⁶⁵ But did it authorize the federal taking of Indian lands without compensation as claimed by Justice Reed?

Contemporary historical scholarship reveals that the European doctrine of discovery was a hotly contested notion by sixteenth-century legal and religious scholars. Indeed, by the time of Marshall's Indian law opinions it was clearly rejected as an international normative principle for the regulation of Europeans' treatment of indigenous peoples and their lands in the New World.¹⁶⁶ Furthermore, Marshall's interpretation of the discovery doctrine also conflicted with the purpose, tenor, and intent of French, British, colonial, or American treaties with those many and powerful eastern Indian tribes.¹⁶⁷ Many influential sixteenth- and seventeenth-

161. The European doctrine of discovery was intended to broker discovery claims of "new lands" between competing European monarchs. 1 PRUCHA, *supra* note 5, at 15. But Marshall turned this doctrine against the governmental and property rights of the Indian peoples as the aboriginal occupants of America.

162. Tee-Hit-Ton Band of Indians v. United States, 348 U.S. 272, 279-85 (1955).

163. *Id.*

164. The noted Indian historian Wilcomb E. Washburn interprets Marshall's opinion in *Johnson* as holding that the "Indians of the United States did not possess an unqualified sovereignty despite the centuries of relations conducted with them in terms of treaties and diplomatic agreements." WASHBURN, *supra* note 17, at 66. He cites Marshall's dictum that the European doctrine of discovery governed American law: because "the property of the great mass of the [non-Indian] community originates in it, it becomes the law of the land and cannot be questioned." *Id.* (quoting *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823)). Washburn asserts that Marshall recognized that "title to the real estate of the nation," as well as the "economic and political demands of the millions [of non-Indians] who now populated the continent," hinged upon his decision in *Johnson*. *Id.* at 65-66.

165. *Id.* at 66.

166. L.C. GREEN & OLIVE P. DICKASON, *THE LAW OF NATIONS AND THE NEW WORLD* 201-26 (1989).

167. Conciliation of the Indian peoples and centralization of Indian commerce was the motivating force that directed British Imperial policy toward the Indian peoples. Indian trade was the economic lifeblood of colonial life in America and it behooved the European and colonial government to cultivate diplomatic relationships that ensured the continued flow of Indian goods and furs into the larger European economic system. *See* 1

century European jurists and thinkers who soundly condemned the Europeans' treatment of the Indios of the New World would have also condemned Marshall's interpretation of the discovery doctrine in *Johnson*. A cursory examination of those thinkers' writings flatly contradicts Marshall's claim of an extant and clear European consensus that would legitimize his interpretation of the European doctrine of discovery.¹⁶⁸

D. Reassessing the Contemporary Value of the Charter

Justice Reed later candidly admitted that America's nineteenth-century dream of a manifest destiny would not have been realized but for the *Johnson* decision.¹⁶⁹ But Reed mistakenly read *Johnson* as a "just so" story that explained that the United States' ascension to power necessarily doomed the Indian peoples.¹⁷⁰ Reed bluntly acknowledged the spurious logic by which Marshall extended preemptive federal title over a vast expanse of Indian lands that were occupied by numerous and powerful tribes who were prepared to militarily contest the federal government's claimed ownership of their lands.¹⁷¹

Reed implicitly rejected Marshall's touted reliance on the established "actual state of things" as mostly wishful thinking that anticipated the federal government's successful conquest of the Indian West. Many of the western Indian tribes continued to exercise full sovereignty over their lands well after the *Johnson* decision.¹⁷² Marshall and Reed's shared grim vision of the Indian peoples' future derived not from a hypothetical sixteenth-century European charter of discovery but from the nineteenth- and twentieth-century desire to possess Indian lands.¹⁷³

Substantial growth in the nineteenth-century non-Indian population, supplemented by the influx of many landless European immigrants, required the states and private land syndicates to shift from an Indian "trading" to an Indian "raiding" strategy as the more efficient means of acquiring Indian lands.¹⁷⁴ The

PRUCHA, *supra* note 5, at 18–28.

168. The Indians' legal status provoked sharp debate between, among others, Juan Gines de Sepulveda (1490–1573) and Fray Bartolome de Las Casas (1484–1566) at Valladolid, Spain, in 1551. Las Casas denounced Spain's reliance on the papal bulls of 1493 as conveying any title to the Indian peoples' lands. Sepulveda, relying on the authority of Aristotle and St. Augustine, concluded that the Indian peoples were obligated to "accept Spanish domination because of the their idolatry and human sacrifice." GREEN & DICKASON, *supra* note 166, at 201–09, 204.

169. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279–80 (1955).

170. *Id.* at 279–91.

171. Justice Reed described Marshall's opinion in *Johnson* as rationalizing the subordinate legal position of the Indian peoples. *Id.* at 279.

172. Justice Reed concluded: "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force." *Id.* at 289–90.

173. Justice Reed's opinion is noted for its arguably "pejorative" references to the Indians' "nomadic" stage of development and "savage" land-tenure concepts. He deploys these notions as the basis for his conclusion that aboriginal occupancy rights may be extinguished without just compensation. WASHBURN, *supra* note 17, at 114.

174. Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic*

Johnson decision, by monopolizing federal control over Indian lands, effectively closed this troublesome gap in federal authority. Only Congress may prescribe the terms and conditions for the future non-Indian settlement of the American West.¹⁷⁵

But Marshall's theory of federal ownership of Indian lands would have left many sixteenth-century jurists and theologians dumbfounded.¹⁷⁶ They would have flatly rejected his hypothesized charter of discovery as wrongfully dispossessing the Indians of their lands. The Indios of New Spain were considered by most reputable European theologians and jurists to be entitled to the possession and ownership of their aboriginal lands.¹⁷⁷ But the key distinction between the *Johnson* decision and the ruling sixteenth-century opinion regarding the Indians' land rights in the New World is this: the Spanish Crown of the sixteenth century sought to incorporate the Indian *peoples* into the larger political and social order, whereas the federal government of the United States sought only to incorporate the Indian *lands* into its domestic legal order.¹⁷⁸

Model of Indian-White Relations, 37 J.L. & ECON. 39 (1994).

175. *Tee-Hit-Ton*, 348 U.S. at 279–80 (citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587–88 (1823)).

176. Brutality toward the Indians of New Spain endangered the Spaniards' souls, according to Father Bartolome de Las Casas, who was to become known as "the protector of the Indians." Las Casas' personal conversion to the cause of the Indians may have been hastened by a Dominican priest's refusal of the sacraments in 1614 because he owned and exploited Indian slaves. Nonetheless, Las Casas devoted his life to persuading both the temporal and spiritual authorities of the sixteenth century that the Indians' rationality as men entitled them to respect and protection under Spanish law. His entreaties to Emperor Charles V were rewarded with authority to establish an Indian mission colony at Terra Firme in Venezuela. Others, such as Fray Antonio de Montesinos, challenged the conquistador community to honor the royal edict that proclaimed Indians to be free men in a sermon that asked: "Are these Indians not men? Do they not have rational souls?" FRANCIS JENNINGS, *THE FOUNDERS OF AMERICA* 131–32 (1993).

177. GREEN & DICKASON, *supra* note 166, at 196–97. Vera Cruz, a Spanish professor of theology at the newly created University of Mexico, lectured extensively on Amerindian rights and concluded that the Indians had been "true lords of their lands" from time immemorial and that the Spanish Crown had no right under natural law to grant their lands to anyone without their express consent. *Id.* at 197.

Professor Green surmises that Vera Cruz's lectures are "another...indication [that] Europe's expansion into the Americas did not accord with proclaimed principles." *Id.* at 198.

178. The Spanish Crown accepted its "special obligation" to protect and preserve its Amerindians. *Id.* at 203. Las Casas and other Spanish theologians denounced the institution of *encomienda* as an "iniquitous and tyrannical" usurpation of the Amerindians' land and political rights. *Id.* at 202. Las Casas specifically rejected the civilizing rationale for Spanish conquest of the Amerindians by observing:

Not only have [Amerindians] shown themselves to be very wise peoples and possessed of lively and marked understanding, prudently governing and providing for their nations (as much as they can be nations, without faith or knowledge of the true God) and making them prosper in justice; but they have equaled many diverse nations of the world, past and present, that have been praised for their governance, politics and customs, and exceed by no small measure the wisest of all of these, such

But the *Johnson* decision can be read as far more than a temporary accommodation of the Indians' use and occupancy rights pending ultimate federal disposition of their lands.¹⁷⁹ Indian use and occupancy rights were to be protected by federal regulatory and military action, if necessary, as against defiant non-Indian settlers. Ironically, the minimal successes by the federal government in this regard seemed only to hasten the Indian peoples' undoing. The federal military forays undertaken to protect the Indian use and occupancy rights served only to outrage frontiersmen and states' rights advocates.¹⁸⁰

But the Indian bargains generated via Marshall's model proved to be a potent barrier to non-Indian settlement of the American West.¹⁸¹ The Indian peoples proved to be far more astute bargainers than Marshall may have anticipated.¹⁸² Many of the federal treaties with the powerful Great Plains tribes required an express Indian consent to the future cession of Indian lands. Unless three-fourths of the adult male tribal members consented to a future land cession, the federal government could not get their lands.¹⁸³

The self-limiting character of the *Johnson* decision became clear. The federal government emerged from that decision as a "super-monopsonist": the sole sovereign buyer of the Indians' lands. But its dominant market power position over Indian lands would prove radically insufficient to achieve its later nineteenth-century goal of rapid western settlement and development.¹⁸⁴

as the Greeks and Romans, in adherence to these rules of natural reason.

Id. at 208-09.

179. Marshall concluded that "Indian title [is] entitled to the respect of all courts until it should be legitimately extinguished." *Johnson*, 21 U.S. at 592.

180. The federal government did use military force to drive illegal settlers off Indian lands. 1 PRUCHA, *supra* note 5, at 112-13. But the settlers always seemed to win out eventually in their goal of settling Indian lands. Prucha cites the insufficiency of federal military forces and the unwillingness of civil authorities to fairly prosecute non-Indian violators of the Indian Trade and Intercourse Act. *Id.* Prucha also surmises that the federal government acquiesced in illegal settlements on Indian lands that had gone on so long and thoroughly as to be irremediable in nature. *Id.*

181. Marshall's Indian law decisions and related federal treaties confirmed the Indian peoples' exclusive use and occupancy rights in vast hunting and roaming reserves in the American West. Cornell argues that the federal government had to "back-peddle" on its treaty commitments so as to facilitate the further incorporation of Indian lands under the allotment program of the late nineteenth century. CORNELL, *supra* note 4, at 45-50.

182. Wilkinson cites as common treaty language those provisions that guarantee the Indian peoples' "permanent" possession of their lands for their undisturbed "use and occupancy." WILKINSON, *supra* note 75, at 15.

183. See, e.g., *supra* note 7 and accompanying text.

184. CORNELL, *supra* note 4, at 45-50.

III. THE SECOND ERA: THE INDIAN PEOPLES' DESCENT FROM SOVEREIGN TO WARDSHIP STATUS

A. The Rise and Fall of the "Measured Tribal Separatism" Policy

The vast expanse of western lands could presumably accommodate the divergent and increasingly antagonistic land uses by encroaching non-Indian settlers and the resident Indian peoples. War Secretary Henry W. Knox believed that an Indian Territory could be carved out of the American West.¹⁸⁵ Congress indeed legislated in 1834 an expansive definition of Indian Country that encompassed virtually all the lands west of the Mississippi River to the Sierra Nevada Mountains.¹⁸⁶

Indian peoples, Knox believed, should be allowed the necessary time, space, and opportunity to adapt their cultures and economies to a non-Indian way of life.¹⁸⁷ His idea of a "measured tribal separatism" was later implemented through federal "peace and friendship" treaties with the strong Great Plains Indian tribes.¹⁸⁸ These treaties confirmed vast roaming, hunting, and gathering reserves for the use and occupancy of these tribes.¹⁸⁹ These treaties also preserved the Indians' lands by requiring that at least a majority of the adult male members of the affected tribes consent to any future land cessions to the federal government.¹⁹⁰

But Knox's assumption that there was enough western land to long accommodate the Indian peoples' hunting and roaming way of life was soon proven mistaken. A tsunami wave of non-Indian demand for western lands swamped Knox's strategy of a measured tribal separatism. The demand for Indian lands skyrocketed after the Civil War, fed by successive waves of new European immigrants and an unexpected increase in America's indigenous non-Indian population.¹⁹¹ Constituent pressure grew for the congressional repudiation of its

185. 1 PRUCHA, *supra* note 5, at 58–60.

186. Congress provided a statutory definition of Indian Country in the Nonintercourse Act of 1834:

[A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purpose of this act, [shall be] deemed to be the Indian Country.

Indian Trade and Intercourse Act, ch. 161, 4 Stat. 729, 729 (1834) (codified as amended at 25 U.S.C. §§ 177, 194 (1994)).

187. Knox's Indian policy grew out of practical motives. Prucha cites Knox as saying that "[i]f our modes of population and War destroy the tribes the disinterested part of mankind and posterity will be apt to class the effects of our Conduct and that of the Spaniards in Mexico and Peru together." 1 PRUCHA, *supra* note 5, at 65–66.

188. WILKINSON, *supra* note 75, at 14–15.

189. *Id.* at 14–19.

190. Indians and their congressional allies attacked proposed territorial bills for Oklahoma in the 1870s as conflicting with treaty promises of self-governance without non-Indian interference. 2 PRUCHA, *supra* note 5, at 741–43.

191. Cornell cites "[w]hite demand" for Indian lands in the 1860s as a key

Indian bargains so as to open the vast hunting and roaming reserves of the Great Plains Indians to non-Indian settlement.¹⁹²

By the 1870s, both the enemies and friends of the Indians grew disenchanted with existing Indian treaties. Their practical objection to these treaties was simple: the Indians had too much land! They faulted these Indian bargains for not forcing the Indian peoples to adopt civilized habits such as farming or ranching. The Indians were largely left free to pursue their traditional subsistence hunting, fishing, and gathering ways of life on their large reserves.¹⁹³

The Great Plains tribes had driven hard bargains with the federal treaty negotiators. They succeeded in establishing a formidable legal barrier to non-Indian incursions into their lands.¹⁹⁴ But critics argued that these bargains thwarted the highest and best economic uses of these lands, locked up, as they were, in large roaming and hunting reserves. These lands could be "unbundled" into highly valued products, goods, and services only through intensive use, substantial capital investment, and the extension of private property rights into those lands.¹⁹⁵

B. Reformulating Marshall's Indian Bargaining Model: The Birth of the Plenary Power Doctrine in Lone Wolf v. Hitchcock

By the 1870s, many non-Indians were convinced that the tribal separatism policy had proven to be a disastrous failure.¹⁹⁶ The Great Plains Indians clung tenaciously to their ancestral lands and cultural traditions. They evinced little obvious interest in adapting to a non-Indian way of life. Furthermore, Indian peoples were regarded as semiautonomous governmental entities. But contemporary critics viewed Indians as dependent governmental wards, not as quasi-independent peoples.¹⁹⁷ They urged that the federal Indian treaties be

impetus for the development of the Indian reservation system. CORNELL, *supra* note 4, at 42.

192. The reform-minded Board of Indian Commissioners had come to support the principle of Indian allotment as a means of assimilating and civilizing the Indian peoples. At the famous Lake Mohonk Conference in 1884, the Board endorsed "heartily" the allotment concept. Non-Indian settlers supported Indian allotment because it would eventually release millions of acres of Indian lands as "surplus lands" for non-Indian entry and settlement. 2 PRUCHA, *supra* note 5, at 659-71.

193. *Id.*

194. *Id.*

195. Stephen Cornell frames the Indian-White conflict over land as a struggle between precapitalist and capitalist views of land use. CORNELL, *supra* note 4, at 34-39. Capitalist "commercialization means that labor and land are no longer controlled by social bonds or cultural practice but are subject instead to market forces." *Id.* at 36. By contrast, in Indian society, "[l]and, labor, and the productive process are inextricably bound up in webs of kinship, ritual, and custom, which themselves render the different aspects of social reality mutually intelligible and interdependent." *Id.* at 38.

196. WILKINSON, *supra* note 75, at 19-23.

197. Bishop Whipple, among other influential friends of the Indian, wanted President Lincoln to treat the Indian peoples as governmental wards, not as members of quasi-sovereign political entities. 1 PRUCHA, *supra* note 5, at 470.

repudiated and that Indian peoples be dealt with as the dependent subjects of congressional will.¹⁹⁸

Three congressional actions in the late nineteenth century combined to transform Marshall's Indian bargaining model. First, Congress decided in 1871 to end Indian treaty making.¹⁹⁹ Second, Congress decided in 1887 to break up the Indian peoples' communally held lands into small homestead-size land parcels that were to be assigned to each tribal member for farming or ranching purposes.²⁰⁰ Third, Congress decided to offer those "surplus" Indian lands that were released by the Indian allotment process to non-Indian settlers.²⁰¹

Many friends of the Indian, including Caleb H. Smith, the Commissioner of Indian Affairs, supported both the repudiation of Indian treaties and the forced Indian allotment program.²⁰² By 1869, Smith argued, Indian treaty making had degenerated into a "cruel farce." He urged that Indians be expressly recognized by Congress as the dependent wards of the federal government.²⁰³ Ending Indian treaty making, Smith argued, would mark the beginning of a more humane and rational Indian policy. The Bureau of Indian Affairs, headed by Smith, would become the primary authority to regulate the Indians' lands and lives.²⁰⁴

But the end to Indian treaty making came as the pragmatic outcome of an institutional revolt led by a handful of congressmen who demanded a greater role for the House of Representatives in the formulation of Indian policy. Historically, the president and his treaty commissioners had directed Indian policy.²⁰⁵ But some House members grew increasingly resentful of the Senate's exclusive legislative power to ratify proposed Indian treaties submitted to it by the president. The House, for its part, was expected to routinely appropriate the monies necessary for the implementation of any Indian treaties agreed to by the president and the Senate.²⁰⁶

The House demanded and ultimately achieved in 1871 the passage of an appropriations rider that ended Indian treaty making.²⁰⁷ It thereby obtained a role in

198. 2 PRUCHA, *supra* note 5, at 659–86.

199. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1994)).

200. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358, 381 (1994)).

201. 2 PRUCHA, *supra* note 5, at 668–69.

202. It was believed that the end of treaty making with the tribes and the beginning of congressional direct rule by statute would be the departure point for a rational and more effective, if not more humane, Indian policy. COHEN, *supra* note 68, at 106.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Critics of Indian treaty making increasingly advocated that Indian tribes should be dealt with by general congressional legislation rather than through treaties that acknowledged Indian tribes as semiautonomous government bodies. Instead, the tribes should be considered as wards of the government and not "quasi-independent nations." *Id.* at 105. The end to the process of treaty making, however, was more a product of traditional

the development and control of future Indian policy. This fundamental shift to congressional, rather than executive, administration of Indian affairs was rationalized as unifying Indian policy and reducing the substantial transaction costs of bargaining on a "government to government" relationship with each Indian tribe.²⁰⁸ But Congress did not go so far as to abrogate, as many non-Indians had advocated, existing Indian treaties. These Indian bargains remain today as bulwarks protecting the Indian peoples' quasi-sovereign status.²⁰⁹

Congress' enactment of the General Allotment Act of 1887 likewise represented a clear repudiation of measured tribal separatism.²¹⁰ That policy had sought to preserve the traditional Indian cultures, economies, and lands from undue or premature disruption by the non-Indian settlement of the West.²¹¹ But the federal allotment program expressly contemplated breaking up the Indian roaming and hunting reserves into individual, Indian-owned agricultural homesteads.²¹²

Each Indian family and individual tribal member would receive a federal trust patent to a homestead-sized parcel of land.²¹³ Only a lone senator, Henry Teller from Colorado, opposed the General Allotment Act. He reviled the Indian allotment policy as a thinly veiled "Indian land grab" that was dressed up in "save the Indian" garb. He predicted that the Indian allotment process would only serve to impoverish, not improve, the Indian peoples' lives.²¹⁴

But the Indian allotment program ran headlong into a potentially lethal road block. Many Indian treaties required that future land cessions be approved by at least a majority of adult male members of the affected tribes.²¹⁵ Could Congress unilaterally revise these Indian bargains? Indeed, the Kiowas and Comanches invoked just such an Indian consent provision, Article 12 of the 1867 treaty of Medicine Lodge Creek, in an effort to enjoin the federal government's coerced allotment of their reservation.²¹⁶ That article required that any further cessions of Indian lands be approved by "at least three-fourths of the adult male" Kiowas and Comanches who were residing on the reservation.²¹⁷

political jealousies than of rigorous policy. Members of the House of Representatives resented the senatorial power to ratify Indian treaties without any role for the House in treaty formulation. The House therefore demanded, and received in 1871, an end to treaty making, and a greater role in the development and control of Indian affairs. *Id.* at 105-07.

208. 1 PRUCHA, *supra* note 5, at 527-33.

209. *Id.*

210. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358, 381 (1994)).

211. WILKINSON, *supra* note 75, at 19-23.

212. *Id.* at 14-19.

213. 2 PRUCHA, *supra* note 5, at 666-71.

214. *Id.*

215. Blue Clark surmises that the allotment policy implicated fundamental express and implied treaty pledges made to Great Plains' Indian tribes in the post-Civil War era. CLARK, *supra* note 90, at 2-3. Common phenomena of the allotment era were "assimilation pressures, land hunger and Indian resistance." *Id.* at 2.

216. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

217. Treaty with the Kiowa and Comanche Tribes of Indians (Treaty of Medicine

Indian Treaty Commissioner David H. Jerome was assigned the unenviable task of persuading those Indians to consent to the allotment of their reservation and to the sale of the surplus lands to non-Indians.²¹⁸ He met with the assembled Kiowas and Comanches at Fort Sill in 1892. He talked candidly to those Indians about the very limited options that the Kiowas and Comanches faced if they refused to accept the allotment of their reservation:

If the Indians will do what the Great Father wants them to do, and do their part well, it will result in your having plenty of food and clothing; and instead of having, as you sometimes do, only one meal a day, you will have three meals a day and have plenty of clothing and things that will make you comfortable through the winter. Instead of having to wait for an issue of beef every two weeks, you can go out and kill a beef of your own and have a feast every day if you please. I told you a little while ago that for twenty-four years the Indians had increased very little if any in numbers. Now, if you follow the plan that we have told you about you will not have your babies die from the cold, but you will have them grow up good, strong, healthy men and women, instead of putting them in the ground.²¹⁹

Indian Commissioner Warren Sayre was even more direct when he spoke to the assembled Indians. He told them that the president could force them to accept allotments whether they wanted them or not. He reminded them that this forced allotment program had already occurred on other Indian reservations.²²⁰ But Lone Wolf answered that his people were not ready for the allotment of their lands and that they did not possess the skills or inclination to succeed as farmers and

Lodge Creek), Oct. 1, 1867, art. 12, 15 Stat. 581, 585.

218. David Howell Jerome was a former Michigan governor who replaced General Lucius Fairchild as head of the so-called Cherokee Commission that had been charged in 1889 with the negotiation of the cession of Indian Territory west of the 96th degree of longitude and the "opening" of those ceded lands to non-Indian settlement. The newly styled Jerome Commission would later facilitate 11 land cession agreements with Indian tribes in Indian Territory that would affect some 15 million acres of Indian lands. CLARK, *supra* note 90, at 36-37.

219. GETCHES ET AL., *supra* note 10, at 200. Clark contends that the Jerome Commission came with "fixed conceptions regarding private ownership of land, the democratizing effects of yeomanry, and the necessity for American Indians to enter the national marketplace of competitiveness for private gain." CLARK, *supra* note 90, at 39.

From the Jerome Commission's viewpoint, communal land ownership was unworkable, tribal governments had to be abolished, and Indian lands allotted to individual tribal members if Indians were to survive in American society. By contrast, the Kiowa Indians approached the negotiations "with their own well established opinions" and they knew already what the commission wanted and why they came. *Id.* at 39. The older warriors who had helped negotiate the 1867 treaty wanted the federal government to adhere to the treaty's guarantee that they would have no less than 30 years in which to hold their ancestral and traditional lands. Jerome opened the negotiations with ill-chosen remarks saying, "I want you to remember that the Government wants nothing from you." Few of the assembled Indians likely gave credence to that remark. *Id.* at 41.

220. GETCHES ET AL., *supra* note 10, at 201.

ranchers.²²¹ Commissioner Jerome responded to Lone Wolf by pressing the Kiowas and Comanches even harder to accept his proposed agreement. Every tribal member would be allotted a 160-acre trust parcel of land. The Kiowas and Comanches would be paid a lump sum of two million dollars for two million acres of tribal lands that would then be opened to non-Indian settlement.²²²

But Quanah Parker and other Indians played for time, arguing that the treaty commissioners should either give the Indians more money for their lands or that the negotiations should be delayed so as to allow the Indians to consult with legal counsel regarding the proposed agreement.²²³ However, Jerome would hear none of it. He wanted the Indians' decision regarding the proposal as presented. By the time he and his colleagues had left the reservation he felt he had done the job that he had been sent to do: he had successfully collected 456 Indian signatures. These were enough Indian signatures to allow Indian agent George Day to certify that well over three-fourths of the adult male tribal members had consented to the Jerome Agreement as required by Article 12 of the Treaty of Medicine Lodge Creek.²²⁴

Jerome transmitted the Indians' signed agreement to President Harrison in January 1893. The Indians had only grudgingly agreed to the allotment and sale of their reserved lands, Jerome admitted in his transmittal letter to the President, but he believed that the agreement was legally binding.²²⁵ Jerome was proven premature in his assessment of the agreement's validity. Interior Secretary Bliss decided to have a new tribal census taken before Congress acted on the Jerome Agreement.²²⁶ This census revealed that Jerome had severely undercounted the adult male members of the Kiowa and Comanche Tribes: there were 725 Indian adult males who were eligible to vote on the Jerome Agreement. Treaty commissioner Jerome had collected only 456 signatures, which fell considerably short of the required three-fourths majority. Secretary Bliss recommended to the congressional committees that the Jerome Agreement not be ratified. He pointed out that the proposed Indian allotments were far too small to support tribal families by livestock grazing or farming. He suggested that negotiations be held with the affected Indian tribes.²²⁷

Despite doubts about the validity of the Jerome Agreement, the Fifty-sixth Congress chose to move forward with final action on the ratification of the Jerome Agreement. The Kiowas and Comanches petitioned Congress not to ratify the Jerome Agreement. They contended that the allotment of the reservation would mean their "destruction as a people and [would bring them] to the same impoverished condition to which the Cheyenne Arapaho and Indian tribes have been brought from the effects of prematurely opening their reservations for the

221. CLARK, *supra* note 90, at 41.

222. *Id.* at 42.

223. *Id.* at 42-46.

224. GETCHES ET AL., *supra* note 10, at 203.

225. CLARK, *supra* note 90, at 43-44.

226. GETCHES ET AL., *supra* note 10, at 200.

227. *Id.* at 204.

settlement of white men among them."²²⁸ But Congress chose not to listen to the Kiowas and Comanches or to Secretary Bliss, and by the Act of June 6, 1900, Congress ratified the Jerome Agreement.²²⁹

C. The Effect of Lone Wolf on the Indian Land Base

Lone Wolf sued in federal court to enforce his people's sovereign bargain by enjoining Interior Secretary Hitchcock from allotting or selling the Kiowas' and Comanches' lands. His complaint alleged that the proposed allotting of the reservation constituted a taking of their lands in violation of Article 12 of the Treaty of Medicine Lodge Creek. His lawyer, William Springer, filed an injunction action on his behalf in the equity division of the Supreme Court for the District of Columbia. His action asked the court to prevent the Interior Department from implementing the General Allotment Act. Lone Wolf urged in his petition that the court hold illegal the Act of June 6, 1900 as contravening the express terms of the 1867 treaty.²³⁰

But Justice A. C. Bradley denied Lone Wolf's request for a preliminary injunction against the federal government's allotment and sale of the Indians' lands.²³¹ Lone Wolf had argued that this unilateral federal action would deprive the Kiowas and Comanches of their treaty-protected property without the due process of law. But the judge disagreed and reasoned that it was within Congress' prerogative to allot any Indian reservation regardless of alleged tribal misunderstandings, deception by treaty commissioners, or a demonstrable failure of tribal consent. Only Congress had the constitutional power to decide this issue, not the courts. Therefore, Lone Wolf's due process objections to the forced allotment and sale of their lands, the court held, should be dealt with by the body that could appropriately balance the competing public interests and the rights of the Indian.²³²

But time and events had overtaken Lone Wolf. By the time that Lone Wolf's appeal from the lower court's decision was scheduled for appellate hearing, more than 150,000 non-Indians had already registered with the federal land office for some 13,000 homesteads in what had once been Kiowa and Comanche land.²³³ Those homesteads were sold to the non-Indian settlers at a price of \$1.75 an acre.²³⁴ It came as no surprise when the court of appeals quickly affirmed the lower court's ruling.²³⁵

Whether the Secretary's allotment and sale of the Kiowa and Comanche lands should be enjoined as violating Article 12 of the 1867 treaty would be decided by the Supreme Court. Lone Wolf urged the Court to hold that Article 12

228. *Id.* at 205.

229. *Id.*

230. *Id.*

231. Decree of the Court of Appeals of the District of Columbia, No. 1109, 4 Mar. 1902, RG 267, File 18454, National Archives.

232. CLARK, *supra* note 90, at 62-63.

233. *Id.* at 66.

234. GETCHES ET AL., *supra* note 10, at 206.

235. CLARK, *supra* note 90, at 66.

plainly prohibited the unconsented allotment or sale of the Indians' lands.²³⁶ But requiring Indian consent as a condition for the federal allotment or sale of their lands was unacceptable to the Court. The judicial imposition of an Indian consent condition, Justice White reasoned, would actually hurt the Indian people. It would "deprive Congress...[of its ability] to partition and dispose[e] of tribal lands...if the assent of the Indians could not be obtained."²³⁷ Justice White readily agreed with Lone Wolf that the Indians' right of occupancy in their lands was legally regarded as "sacred as the fee [title] of the United States in the same lands."²³⁸ But only private parties and the states—not Congress—were legally bound to respect Indian land titles.²³⁹ Congress, unlike private citizens or states, was possessed of a plenary authority over the Indians' lands.²⁴⁰ It would be fruitless, therefore, Justice White concluded, to require the federal courts to hear Indian testimony that would demonstrate that their signatures to the Jerome Agreement had been procured by the fraud or that three-fourths of the adult male tribal members had not signed that agreement.²⁴¹ The unquestioned tribal status of the affected Indians, coupled with Congress' declared purpose to give adequate consideration to the Indians for their lands, meant to Justice White that there were no viable issues for judicial decision.²⁴²

From White's viewpoint, the Indians' complaint that Congress had illegally taken their lands was wide of the mark.²⁴³ Congress' allotment and sale of the Indian peoples' lands was not a *taking* so much as it was a *transmutation* of those lands into equivalent financial assets. Justice White concluded his opinion with the notorious admonition that the federal courts must "presume that Congress acted in perfect good faith in dealing with the Indians."²⁴⁴ The Court's decision affirmed the federal government's demurrer to Lone Wolf's petition for injunctive relief.²⁴⁵

The *Lone Wolf* decision fundamentally reformulated Marshall's Indian bargaining model. It replaced its "government to government" relationship with a new judicial creation—the federal plenary power doctrine. That doctrine freed Congress to allot and sell the Indian peoples' lands without their consent. Congress was empowered as the Indians' guardian to freely dispose of Indian lands.²⁴⁶

236. *Id.*

237. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 554 (1903).

238. *Id.*

239. *See id.* at 564–65.

240. *Id.* at 565–66.

241. *Id.* at 567–68.

242. CLARK, *supra* note 90, at 71–72. But from Justice White's viewpoint, the Indians' right of occupancy was not equivalent to ownership of their lands. The federal government was the owner of the Indian lands and could effectuate a change in the Indians' use of those lands if it was necessary for the Indians' benefit. *Id.*

243. *Lone Wolf*, 187 U.S. at 568.

244. *Id.* Justice White characterized Congress' allotment and sale of the Indians' land as effecting "a mere change in the form of the investment of tribal property." *Id.*

245. CLARK, *supra* note 90, at 73.

246. *Id.* at 102–03. Clark places *Lone Wolf* in the larger, international law context

IV. THE THIRD ERA: JUDICIAL INDECISION REGARDING THE COMPENSABILITY OF INDIAN TITLE

A. *Judicial Confirmation of Compensability: The Impact of United States v. Shoshone Tribe*

Sovereign bargaining had been the historic means by which Indian peoples sought to preserve their lands from federal takings. But the idea of an Indian Country wherein the Indian peoples were free to create their own laws, cultures, and economies had seemingly collapsed under the weight of the federal plenary power doctrine. No longer did the federal government pledge to use its military forces to ensure that states and non-Indians respected the Indian Country boundary.²⁴⁷ The *Lone Wolf* doctrine breached this boundary by recognizing a judicially unfettered federal plenary power over Indian lands.²⁴⁸ The Indian peoples were forced to seek a new strategy to preserve their remaining lands.

The federal courts would clearly not enjoin a congressional breach of Indian bargains, but would the courts require the payment of just compensation for the federal taking of Indian lands?²⁴⁹ Such a requirement would provide the Indian peoples with some measure of substantive protection against Congress' unprincipled exercise of plenary power over their lands.²⁵⁰

The Indian allotment program and the sale of "surplus" Indian lands reduced the total Indian land holdings by some ninety to one-hundred million acres.²⁵¹ Congress' primary purpose in the allotment program was to spur the non-Indian settlement of America's western lands. Many non-Indian constituencies—railroads, homesteaders, mineral prospectors, and land speculators—benefitted from Congress' largess in disposing of the Indian peoples' lands.²⁵² Indeed, Justice Reed later remarked that the rapid and efficient development of the American West would have been inconceivable absent Marshall's Indian law decisions.²⁵³

But by the advent of the New Deal Era in the 1930s, America's western frontier had long since closed.²⁵⁴ In 1934, Congress repudiated its Indian allotment

when he analyzes Henry Cabot Lodge's reliance upon that decision, among other Indian law decisions, as the basis for the United States' assumption of guardianship over foreign "domestic, dependant nations" during Senate debates for the federal government's assumption of guardianship over the "dark skinned" peoples of the Philippines. *Id.*

247. CORNELL, *supra* note 4, at 42–43. Cornell contends that Indian "assimilation and removal" joined hands in the late nineteenth century as reflected in federal Indian policy. *Id.*

248. *Id.*

249. See Kelly, *supra* note 115, at 668.

250. See generally Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 751–53 (1993).

251. GETCHES ET AL., *supra* note 10, at 196.

252. See CORNELL, *supra* note 4, at 37–38.

253. Tee-Hit-Ton Band of Indians v. United States, 348 U.S. 272, 289–90 (1955); see *supra* note 175 and accompanying text.

254. Homestead filings on "opened" Indian lands had by the late 1920s dwindled

policy and adopted fundamental Indian land and governmental reforms as the hallmark of its "Indian New Deal."²⁵⁵ These reforms were intended to promote the new federal policy of tribal economic development and political self-determination.²⁵⁶ But only forty-eight million acres of Indian lands remained by then.²⁵⁷ Those lands were owned by either Indian tribes or individual Indian allottees. Indian land reform became a central focus of Roosevelt's Indian policy. This policy expressly rejected the flawed and failed Indian allotment policy of the late nineteenth century.²⁵⁸ A judicial rethinking of the *Johnson-Lone Wolf* line of decisions that had made Indian allotment and the surplus lands sales possible seemed likewise justified.

Renewed respect for Indian land rights was the Supreme Court's contribution to the goal of tribal revitalization. The Supreme Court's decision in *United States v. Shoshone Tribe*²⁵⁹ was hailed by Indians as a major step toward the judicial protection of Indian lands.²⁶⁰ The facts of the *Shoshone* case were straightforward: the federal government had decided to settle an additional band of Indians upon the Shoshone's reservation without their consent. By an earlier Indian treaty of 1863, the United States had set aside a vast area of some forty-four million acres for the hunting and gathering use of the Shoshone people. However, Congress prevailed on the Indians to cede all but three million acres of those lands to the federal government by the Fort Bridger Treaty of 1868.²⁶¹ Those lands were "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians."²⁶²

The *Shoshone* Court emphasized that the federal government knew in 1868 that the Shoshone's lands contained valuable mineral deposits of gold, oil, coal, and gypsum.²⁶³ Those lands also included more than 400,000 acres of timber,

to almost nil. CORNELL, *supra* note 4, at 89. Land acquisition that had been the "motor" of Indian policy was no longer to shape Indian policy as it had in the late nineteenth century. New social goals of progressivism, cultural pluralism, and economic rejuvenation would have their resonance in the reshaping of federal Indian policy in the 1930s. *Id.*

255. David Getches points to section 1 of the Indian Reorganization Act, Pub. L. No. 73-383, § 1, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 461 (1994)), which ended the Indian allotment program and section 4, *id.* Stat. at 985 (codified as amended at 25 U.S.C. § 464 (1994)), which prohibited future alienation of Indian land without tribal consent as evidence of this land reform impulse. GETCHES ET AL., *supra* note 10, at 218-19.

256. Cornell contends that the protribal rhetoric of the Indian New Deal only thinly disguised its assimilative character. Indian tribes were required to choose between "an alien constitutional form of government and the uncertainties of the pre-IRA period." CORNELL, *supra* note 4, at 94.

257. GETCHES ET AL., *supra* note 10, at 196.

258. *Id.*

259. 304 U.S. 111 (1938).

260. GETCHES ET AL., *supra* note 10, at 294. Getches concluded that this decision "removed considerable confusion over the extent of tribal property interests relative to the interests of the United States." *Id.*

261. *Shoshone Tribe*, 304 U.S. at 114.

262. *Id.* at 113.

263. *Id.* at 114.

extensive well-grassed bench lands, and fertile river valleys that were readily irrigable.²⁶⁴ The lower court ruled that the settling of the Northern Arapaho Tribe on the Shoshone's Wind River Reservation had amounted to a Fifth Amendment taking of one-half of that reservation as of March 19, 1878.²⁶⁵

The lands so taken amounted to 1,171,770 acres, for which the trial court awarded the tribes \$1.35 an acre or \$1,581,889.50.²⁶⁶ But the United States disputed the trial court's inclusion of certain additional elements of value in its calculation of the just compensation owing to the Shoshone Tribe. It argued that the Indians' right of the use and occupancy of the taken lands should be valued "net the value of the timber or mineral assets."²⁶⁷

The *Shoshone* Court responded to this contention with a resounding affirmation of Chief Justice Marshall's bold and sweeping principle that the Indians' right of occupancy is "as sacred and as securely safeguarded as is fee simple absolute title."²⁶⁸ It held that the federal government's appropriation of that tribal interest rendered the government liable for the payment of just compensation.²⁶⁹ The Court limited its 1903 *Lone Wolf* decision as holding only that Congress had the power to "prescribe title by which individual Indians may hold [allotments and] to pass laws regulating alienation and descent."²⁷⁰ In affirming the lower court's just compensation award, the Court observed that this federal guardianship power over Indian lands "detracts nothing from the tribe's ownership."²⁷¹

B. Judicial Indecision Regarding the Compensability of Aboriginal Indian Title: The Two Decisions in United States v. Alcea Band of Tillamooks

The *Shoshone Tribe* decision gave new life to those sovereign agreements that guaranteed the Indians' use and occupancy rights in their lands. But that decision seemed to cut deeper by recognizing the sanctity of the Indian peoples' aboriginal use and occupancy rights.²⁷² Some thought that the *Shoshone Tribe* decision had substantially limited, if not overruled, the *Lone Wolf* doctrine. Because the Court had resoundingly reaffirmed the Indians' right of "use and occupancy," it seemed poised to extend just compensation protection to the aboriginal right of "use and occupancy."²⁷³ But this hope would soon be dashed by subsequent judicial decision.

264. *Id.*

265. *Id.* at 112.

266. *Id.* at 114–15.

267. *Id.* at 115.

268. *Id.* at 117.

269. *Id.* at 118. The *Lone Wolf* doctrine allows Congress to "prescribe title by which individual Indians may hold tracts...within the reservation [, but this power] detracts nothing from the tribe's ownership." *Id.*

270. *Id.*

271. *Id.*

272. *See id.*

273. *Id.* at 115, 118. The jurisdictional act allowing the Indian tribe to bring suit

Commentators have various explanations for the Supreme Court's refusal to extend just compensation protection to aboriginal lands.²⁷⁴ Some suggest the Court concluded that it would be financially imprudent to constitutionalize all Indian land titles. That step potentially would have required the United States to pay billions of dollars in just compensation to satisfy those Indian takings claims.²⁷⁵ Some suggest that the Court conceived of the federal plenary power doctrine as a logical complement to the federal trust authority over Indian lands.²⁷⁶

The Supreme Court, whether motivated by timidity or prudence, struggled in the 1940s and 1950s to develop a workable concept of Indian title that would reconcile Congress' plenary power over Indian lands with the just compensation command of the Fifth Amendment.²⁷⁷ But the Court failed in its effort to synthesize a modern Indian takings doctrine. Instead, the Court recategorized Indian title into two classes: a judicially protected class of Indian title based on federal recognition and an unprotected class of Indian title based on aboriginal "use and occupancy."²⁷⁸

The Court had earlier refused to differentiate types of Indian title in *Tillamooks I*.²⁷⁹ Its plurality decision seemingly abolished any constitutional

against the United States created no new cause of action. Therefore, whatever legal or equitably compensable rights the Indians had unavoidably derived from their aboriginal use and occupancy of those taken lands. Kelly, *supra* note 115, at 668.

274. The Court's analogy of aboriginal title to treaty title strongly suggested a Fifth Amendment basis for recovery in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946) [hereinafter *Tillamooks I*]. But soon after, in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court began to retreat from that position. Justice Reed suggested in *Hynes* that the Indian right of occupancy is not compensable without a special statutory direction to make payment for such a taking. *Id.* at 105-06 & n.28.

275. The "specter of huge, fiscally ruinous interest recoveries in Indian title litigation—recoveries far in excess of the fair market value of the appropriated lands—may have dissuaded [the Court in *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951) [hereinafter *Tillamooks II*]] from constitutionalizing its prior decision." Kelly, *supra* note 115, at 669-70.

Given that the Court has chosen to "characterize the Indian land issue as primarily a matter for congressional determination, the future of the Indian title concept remains as vulnerable to political pressure as it had been in the past." *Id.* at 686.

276. Newton, *supra* note 34, at 254-55.

277. Historian Wilcomb E. Washburn traces the Court's struggle in the 1940s and 1950s to reconcile Indian taking claims with the just compensation command. He characterizes the "fundamental constitutional issue" as whether the federal taking of aboriginal lands required that just compensation be paid to the affected Indians. Washburn concludes that the Court was clearly troubled by the federal government's assertion that it could take aboriginal lands without any liability to pay compensation. WASHBURN, *supra* note 17, at 110-15.

278. *Id.* at 255.

279. 329 U.S. 40. Historian Wilcomb E. Washburn notes that the "fundamental constitutional issue" of the compensability of taken Indian title was not confronted until the *Tillamooks I* & *II* decisions. WASHBURN, *supra* note 17, at 110-11. This Indian band had been statutorily authorized to sue the United States in 1935 for "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes or bands." *Id.* at 111.

distinction between aboriginally based Indian title and federally recognized Indian title.²⁸⁰ That decision seemingly protected aboriginal use and occupancy rights from taking by the federal government.²⁸¹ Justice Vinson concluded in *Tillamooks I* that the Indians had more than a mere moral claim for just compensation.²⁸² Some lower federal courts thought that the Court's decision in *Tillamooks I* extended *Shoshone's* just compensation protections to the Indian peoples' purely aboriginal use and occupancy rights.²⁸³

But this assumption was rudely dispelled by the Court's decision nine years later in *Tee-Hit-Ton*.²⁸⁴ That decision sharply differentiated between those Indian takings claims based on mere aboriginal use and occupancy and those based on federally recognized Indian land titles.²⁸⁵ Two intervening factors may help explain this decision. First, in 1946, Congress created the ICC,²⁸⁶ which was authorized to hear a wide variety of Indians' claims against the federal government consistent with a broad jurisdictional grant that was set forth in its organic act.²⁸⁷ Second, the Department of Justice and the General Accounting Office advised the Court of the potential liability involved if the United States were required to pay interest from the time of taking on all pending Indian takings claims.²⁸⁸ This advice arguably influenced the Court's decision in *Tillamooks II*.²⁸⁹ There, the Court noted

Given that the usual federal practice was "not to coerce the surrender of [Indian] lands without consent and without compensation." *Id.* at 112. This federal practice led the Court to conclude that more than "sovereign grace prompted the obvious regard given to Indian title." *Id.* Washburn concludes that the Court expressly rejected the federal government's proffered distinction between "recognized" and "unrecognized" Indian title as the basis "to rule out" the *Tillamooks'* compensation claim. *Id.*

280. *Tillamooks I*, 329 U.S. at 50–54.

281. WASHBURN, *supra* note 17, at 110–15.

282. 329 U.S. at 49–50.

283. The three dissenters in *Tillamooks I*, led by Justice Reed, seemed to think so as well. Despite their agreement with the majority regarding the necessity of judicial limits on Congress' plenary power over Indian lands, the dissent did not think that meant "Indian lands unrecognized by specific actions of Congress were protected by the Fifth Amendment." WASHBURN, *supra* note 17, at 112.

284. *Tee-Hit-Ton Band of Indians v. United States*, 348 U.S. 272 (1955).

285. The *Tee-Hit-Ton* Indians were a small band of Tlingit Indians who resided in Alaska and claimed compensation for the federal cutting of timber from lands that they claimed they held by original Indian title. WASHBURN, *supra* note 17, at 113.

286. Indian Claims Commission Act, ch. 959, Pub. L. No. 79–726, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v–3).

287. Interior Secretary Ickes and Associate Solicitor Felix S. Cohen urged the congressional committee to amend the pending ICC legislation so as to allow for the "broadest possible jurisdiction to hear all manner of [Indian] claims, guarantee finality, establish an investigation division and allow review by the Court of Claims and the Supreme Court." ROSENTHAL, *supra* note 47, at 84–85.

288. Separation of powers concerns arguably explain Justice Reed's opinion in *Tillamooks II*. His citation to a Department of Justice's estimate that the interest component alone on pending Indian taking claims amounted to some nine billion dollars recognizes that it is Congress, not the judiciary, that controls the nation's expenditures. Kelly, *supra* note 115, at 670.

289. In *Tillamooks II*, 341 U.S. 48 (1951), the Court held that an award of interest

that the principal value of the taken Indian lands was some three million dollars, but the interest component of the award amounted to fourteen million dollars.²⁹⁰ The Department of Justice, in the interim, advised the Court that the estimated total liability of the federal government, in terms of accumulated interest owing from the time of taking of the Indian lands, exceeded nine billion dollars!²⁹¹

Tee-Hit-Ton involved a takings claim by a small Indian band regarding the federal sale of all the merchantable timber within a 350,000-acre area of the Tongass National Forest in Alaska.²⁹² The Tee-Hit-Tons claimed title based on their aboriginal use and occupancy of this area.²⁹³ They sued for just compensation for value of the taken timber based on either their demonstrated aboriginal use and occupancy of those lands or by virtue of the federal government's recognition of their title to the lands in question.²⁹⁴

The Tee-Hit-Tons contended that, unlike the nomadic Indian peoples of the lower forty-eight states, their band had a well-developed social order that included a clear conception of property rights and ownership.²⁹⁵ But the Court found that the Tee-Hit-Tons' conception of property ownership was based on shared communal use and ownership.²⁹⁶ The band did not, Justice Reed opined, recognize or enforce individual rights of ownership in distinct parcels of land.²⁹⁷ He quoted the only expert witness that was offered at trial by the Indian band. That witness testified:

Any member of the tribe may use any portion of the land that he wishes, and as long as he uses it that is his for his own enjoyment, and is not to be trespassed upon by anybody else, but the minute he stops using it then any other member of the tribe can come and use the area.²⁹⁸

This testimony convinced him, as it had the trial judge, that the Tee-Hit-Tons had only evolved to "a hunting and fishing stage of civilization."²⁹⁹

against the federal government requires a specific statutory direction to do so. Because the 1935 jurisdictional act that authorized this band to sue did not contain such direction, the Court of Claims award of 14 million dollars in interest was in error. WASHBURN, *supra* note 17, at 113.

290. Tee-Hit-Ton Band of Indians v. United States, 348 U.S. 272, 283 n.17 (1955).

291. *Id.*

292. *Id.* at 273.

293. *Id.* at 293.

294. *Id.* at 277.

295. Historian Washburn cites Justice Reed's "pejorative references" to the Indian band's "savage status" and "nomadic pattern of land use" as a basis for Justice Reed's conclusion that Indian title can be extinguished by Congress without compensation. WASHBURN, *supra* note 17, at 114.

296. Tee-Hit-Ton, 348 U.S. at 287-88.

297. *Id.*

298. *Id.* at 286.

299. *Id.* at 287.

Given its status as a nomadic tribe with nomadic concepts of property rights, Justice Reed concluded that the band possessed mere "claims of right to use identified territory," which were indistinguishable from those enjoyed by the similarly nomadic Indian tribes of the lower forty-eight states.³⁰⁰ Further, because the Tee-Hit-Tons' notion of property was indistinguishable from those held by Indians of the lower United States, the band's claim was governed by the *Johnson* rule that "discovery gave an exclusive right [to the federal government] to extinguish the Indian title of occupancy, either by purchase or by conquest."³⁰¹

Justice Reed also distinguished the Court's holding in *Tillamooks I*. That decision, which had awarded just compensation for a taking of clearly aboriginal Indian title, resulted from a specific statutory direction to pay that level of compensation to the wronged tribe.³⁰² Justice Reed chastised the Ninth Circuit Court of Appeals for its wrong-headed reading of the *Tillamooks* decision regarding the compensability of aboriginal Indian title.³⁰³ In *United States v. Miller*, the Ninth Circuit held that a federal taking of the Indians' right of aboriginal "use and occupancy" entitled them to an award of just compensation under the *Tillamooks* rationale.³⁰⁴ Justice Reed sought to resolve this issue with a knockdown holding: Indian occupation of land without governmental recognition of ownership creates no right against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.³⁰⁵

Justice Reed also expressed his moral disquiet regarding an arguably outsized award of just compensation to a small, possibly dying band of Indians.³⁰⁶ Imposing such a financial requirement on the federal government did not seem, given the circumstances of the Tee-Hit-Ton Band, to make moral or equitable sense to Justice Reed. His language suggests reluctance to award a windfall that would be enjoyed by the few remaining members of a now significantly diminished band of Indians. He pointedly emphasized that the Tee-Hit-Ton Band was comprised of some sixty-five members with only a "few women of child bearing age." His factual citation illustrated his view of the contemporary Tee-Hit-Tons as a remnant band of Indians.³⁰⁷

C. Justice Reed's Revision of Johnson v. M'Intosh: Rationalizing the Bright-line Distinction Between Recognized and Unrecognized Indian Title

The Court in *Tee-Hit-Ton* seemingly sought to coordinate its judicial function with Congress' 1946 creation of the ICC. The ICC had been directed by Congress to evaluate those Indian claims that arose out of, among other things, the

300. *Id.* at 287–88.

301. *Id.* at 280.

302. *Id.* at 282–83.

303. *Id.*

304. 159 F.2d 997 (9th Cir. 1947).

305. *Tee-Hit-Ton*, 348 U.S. at 284–85.

306. *Id.* at 285–86.

307. *Id.* at 286.

federal government's takings of aboriginal Indian title.³⁰⁸ The prudential response to the ICC's creation required the Court's revitalization of the political question doctrine.³⁰⁹ The Court in *Tee-Hit-Ton* clearly wanted to close the courthouse doors to aboriginally based Indian taking claims. The Court's revitalized political question doctrine formed the "bright line" boundary that marked off takings claims based on federally recognized title from those based on aboriginal use and occupancy. Indian takings claims based on aboriginal use and occupancy rights were relegated to Congress for relief.³¹⁰

Indians were entitled to just compensation for a taking of their lands only if they could meet two conditions. First, they had to show that Congress had taken deliberate action to recognize their *permanent* use and occupancy rights. Absent evidence of such recognition—usually embodied in an authoritative treaty, statute, or a demonstrated congressional course of conduct—they were deemed to hold only unrecognized and noncompensable Indian title.³¹¹ Second, they had to show that Congress had not acted in its *Lone Wolf* garb as Indian guardian when it took their lands.³¹² Congress, as the Indian guardian, had the power to make a good faith transmutation of those lands into equivalent financial assets. If Congress made a *prima facie* showing on this issue, then it was immune from any just compensation claim regardless of the economic injuries that may have been inflicted on the affected Indians.

***D. Judicial Deference to Congressional Grace in Compensating Indian Peoples:
Clearing Indian Title Through the Indian Claims Commission***

Justice Reed's opinion in *Tee-Hit-Ton* must be read against the background of the 1946 creation of the ICC.³¹³ The ICC's purpose was to achieve a pragmatic and definitive settlement of longstanding Indian claims against the federal government.³¹⁴ It was Congress' exclusive prerogative, according to Justice Reed, to compensate Indians for the taking of their aboriginal use and occupancy rights.³¹⁵

The ICC grew out of the perceived need for a general mechanism for the adjudication of longstanding Indian claims against the United States. Non-Indian groups had long pressured Congress to either repudiate or settle outstanding aboriginal Indian land claims. They sought the enactment of a title-clearing mechanism that would remove the troubling cloud of original Indian title from their

308. Kelly, *supra* note 115, at 675–76.

309. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

310. Kelly, *supra* note 115, at 667–71.

311. *Id.* at 672–73.

312. *Id.* at 672–74.

313. Indian Claims Commission Act, ch. 959, Pub. L. No. 79–726, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v–3).

314. The ICC was established with the "explicit purpose of disposing of all pre-existing Indian claims against the government." Sandra C. Danforth, *Repaying the Historical Debt: The Indian Claims Commission*, 49 N.D. L. REV. 359, 360 (1972).

315. Kelly, *supra* note 115, at 670–71.

lands.³¹⁶ Those present-day occupiers of former Indian lands justifiably worried that Indians would seek the judicial enforcement of their aboriginal Indian titles through common law ejectment or trespass actions. They sought congressional protection that would extinguish those Indian claims.³¹⁷

By contrast, the friends of the Indians pointed to their well-known heroism during World War II and earlier as warrant for congressional action that would fairly settle the many outstanding Indian claims.³¹⁸ These ideas converged as the ICC. This administrative tribunal would maximize several values. It would ensure congressional oversight of proposed ICC compensation awards to prevailing Indian tribes or bands, and would provide an efficient and flexible vehicle for the liquidation of Indian claims against the United States.³¹⁹

The ICC's expected efficiency and flexibility was a relative concept. Historically, Indian claims could be heard only if Congress enacted a jurisdictional grant that authorized a particular tribe or band to bring suit against the United States.³²⁰ This Indian claims process was both time consuming and cumbersome. It functioned much like a lottery in that chances for recovery were arbitrarily allocated by widely varying jurisdictional grants of authority to the Court of Claims.³²¹

Congress sought to standardize the jurisdictional guidelines under which the ICC would hear and determine authorized Indian claims.³²² However, critics of the ICC fault the process as not achieving either flexibility or efficiency in its administrative implementation of its jurisdictional authority.³²³ The ICC's failure stems from many factors. First, only Indian tribes, not individual Indians, were authorized to prosecute any claims within the purview of the ICC's jurisdictional grant.³²⁴ Second, the ICC could only adjudicate those Indian claims that arose on or

316. One purpose of the commission was to "wipe the slate clean" of Indian claims "that weighed upon the white conscience." ROSENTHAL, *supra* note 47, at 49.

317. GETCHES ET AL., *supra* note 10, at 311-18.

318. Congress' desire to right moral wrongs to Indians focused on two issues: first, the ICC mechanism would eliminate the historic discrimination that Indians had faced in being barred from bringing takings and other claims against the United States; and second, the ICC mechanism would allow resolution of all outstanding Indian claims, not only those with a basis in law or equity. Danforth, *supra* note 314, at 366-67.

319. The Indian claims processing policy contemplated that the ICC's jurisdiction would extend to recommending claims awards to Congress, but Congress would be the "focal point" in that it could "finally dispose of claims, by rejecting them or granting awards, or it could stipulate that a court hearing was necessary to resolve all relevant issues." *Id.* at 372.

320. *Id.* at 362-63.

321. *Id.*

322. *Id.*

323. Danforth concludes the ICC became "more concerned with accomplishing its task than ensuring that all just claims receive a hearing and appropriate compensation." *Id.* at 402.

324. Only groups of Indians, not individuals, were authorized by the ICC statute to file claims with that commission. *Id.* at 388.

before August 13, 1946.³²⁵ Third, although the federal government agreed to waive its defenses that it may otherwise have asserted to bar those Indian claims, it exacted concessions from the Indian claimants as well.³²⁶ Indian claimants were not entitled to receive interest from the time of taking regardless of whether their claims arose in 1846 or 1946.³²⁷ Furthermore, the taken Indian property was to be appraised as of the time of taking, not at its contemporary highest and best use value.³²⁸

Fourth, the ICC failed to fully utilize its jurisdictional grant so as to achieve the full remedial intent of the statute.³²⁹ Few innovative or novel Indian takings claims were heard by the ICC, despite its broad grant of authority to do so.³³⁰ By a crabbed interpretation of its authority, the ICC heard only a limited claims docket of standard Indian claims. By its narrow construction of its authority, the ICC arguably eviscerated the "fair and honorable dealings" provision of the ICC Act.³³¹ The ICC's practice was to disallow Indian damages claims that were based on novel legal theories.³³² For example, it refused to hear those Indian claims that alleged real, but intangible, injuries such as the destruction of aboriginal hunting or fishing reserves; or the purposeful destruction of tribal governmental structures; or the imprisonment of tribal members in remote detention sites.³³³ The actual cases decided by the ICC fell into a narrow bandwidth of its potential jurisdiction. A cursory assessment of the ICC's docket reveals standard Indian land claims and claims that were based on the federal government's failure to perform specific treaty obligations or to pay specified amounts of annuities.³³⁴

325. Indian Claims Commission Act, ch. 959, Pub. L. No. 79-726, § 24, 60 Stat. 1049, 1056 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v-3).

326. Danforth, *supra* note 314, at 388.

327. The ICC adopted the general rule that, in the absence of a specific statutory direction to pay interest or unless the taking occurred in violation of the Fifth Amendment, no interest was to be paid to the prevailing Indian parties. *Id.* at 397.

328. Valuations of Indian lands were to be made at the time of taking with no consideration of the element of future profits that could have been made by the Indians from their exploitation of their agricultural, mineral, or timber resources. *Id.*

329. Danforth cites the ICC's view that it "had no role in claims filing" and the lawyers' conservative claims strategy that led them to avoid the "risks of using new causes of action...for which there were now precedents to indicate how assessments might be made and thus how large recoveries would be." *Id.* at 391.

330. *Id.* at 389-90.

331. Section 2, clause 5, of the ICC Act authorizes the commission to "hear and determine...claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Indian Claims Commission Act, ch. 959, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v-3). Danforth believes that the "most important reason...was related to the nature of compensation to be awarded and to the novel character of parts of Section 2." Danforth, *supra* note 314, at 390. She concludes that lawyers that represented the Indian claimants on a contingent fee basis were, by nature, wary of novel claims that may not result in large monetary awards. *See id.* at 391.

332. *See* Danforth, *supra* note 314, at 391.

333. *See id.*

334. *See id.* at 389.

Fifth, the ICC limited its remedies to damage awards, while some prevailing Indian claimants clearly desired the replacement or restoration of their taken lands.³³⁵ Certain intangible values—the lands' roles as sacred cultural or religious sites—could not be addressed via a damages award. Furthermore, the futility and failure of small per capita distributions of Indian claims awards as meaningful remedies is well documented.³³⁶ Those per capita distributions were patently insufficient to allow injured Indians to replace, at contemporary market prices, their taken lands or resources. History shows that these meager per capita distributions were quickly expended to meet current subsistence needs. Only a small amount of the accumulated ICC claims monies were used to provide meaningful substitutes for taken tribal resources so as to provide injured Indians with replacement subsistence values or incomes.³³⁷

Eight-hundred million dollars in ICC awards was hailed by Felix S. Cohen as having finally and fairly "closed the books" on the federal government's duty to fairly compensate its Indian wards.³³⁸ But this idea of retrospective justice, Cohen would likely agree, is elusive given the historic harms done to the Indian peoples. Cohen's conclusion was not intended to address the contemporary need for an Indian takings doctrine that will protect today's vestigial Indian Country from similar depredations.³³⁹ Today's Indian peoples seek practical approaches, not retrospective remedies, to preserve their lands. This desire must translate into practical means for enforcing sovereign bargains that guarantee their use and occupancy of their lands.³⁴⁰

The *Tee-Hit-Ton* decision represents the extreme parameter of judicial thinking on this issue.³⁴¹ It suggests that Indian lands remain in a judicially declared

335. See ROSENTHAL, *supra* note 47, at 250.

336. See *id.*

337. Rosenthal characterizes the ICC as a "legal-bureaucratically oriented structure more concerned with accomplishing its task than insuring that all just claims receive a hearing and appropriate compensation." *Id.* at 245 (citation omitted).

Rosenthal cites legal scholar Morton E. Price's conclusion as evidence of the ICC's overall failure to treat the Indians justly:

If there had been full compensation, the Indians would have gathered enormous wealth, either in land or money. Economic development—in the sense of providing immediate financial security—would have been assured.... On the other hand, it was preposterous to recognize fully such extraordinary claims of a handful of poor people, even to the extent that they were based on legitimate entitlement.

Id. at 245–46.

338. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–43 (1947).

339. See *id.*

340. See *id.*

341. Newton points out that the decision "greatly narrowed the protection of the fifth amendment for Indian land." Newton, *supra* note 34, at 255. The Court narrowed the definition of Fifth Amendment protected property so as to exclude aboriginal Indian land titles established by use and occupancy. See *id.*

"state of nature" wherein federal plenary power can trump the Indian peoples' rights.³⁴²

V. RECONSTRUCTING MARSHALL'S INDIAN BARGAINING MODEL: A SKETCH OF A MODERN INDIAN TAKINGS DOCTRINE

Analyzing the 1949 congressional taking of the Fort Berthold Indian Reservation aids in reconstructing Marshall's Indian bargaining model. The Fort Berthold Indians ostensibly bargained with the federal government for a fair agreement for the taking of their lands.³⁴³ But the forty-three-year-long struggle by those Indians to obtain just compensation exemplifies the power disparity that allows Indian congressional committees to ignore basic principles of just compensation doctrine and practice. The formulation of modern Indian takings doctrine encompasses three basic issues. First, should the plenary power doctrine immunize Congress from an Indian taking claim regardless of the economic and governmental injuries imposed on the affected Indian people? Second, should congressional guardianship power over its Indian wards limit judicial scrutiny of federal takings of Indian lands? Third, should subjective legislative valuation of Indian lands be deemed just compensation when it is plainly at odds with the "make whole" command of the Just Compensation Clause?³⁴⁴

A. *The Fort Berthold Indians' Challenge to the 1949 Congressional Taking of Their Reservation*

Congress decided in 1949 to take 156,035 acres of the Fort Berthold Indian Reservation as the site for a federal dam and reservoir.³⁴⁵ The Army Corps of Engineers determined in 1946 that it needed those lands as the preferred engineering site for the Garrison Dam and Reservoir.³⁴⁶ This dam was to be the

342. See, e.g., EPSTEIN, *supra* note 15, at 39–49.

343. Meyer quotes anthropologist Ruth Hill Useem regarding the dominant assumptions that govern the federal government's relations with the Indian peoples:

(1) That over the years, the Indian can expect no consistency in policies regarding him; (2) That the interests of the dominant society will take precedence over the interests of Indians in any policy decision; (3) That the Indian can do little to affect decisions concerning Indians; (4) That whatever the policy enacted, the Indian will be told that such policy "is in his best interests" or is "for his own good"; and (5) That the stated goals of a policy may be and usually are quite different from the consequences, with the goals being more favorable to the Indians than the consequences.

Meyer, *supra* note 45, at 349.

Meyer concludes that the Fort Berthold Indians likely shared in these beliefs given their "disillusioning experiences" that "characterized the period of negotiations over the Garrison project." *Id.*

344. See Newton, *supra* note 34, at 259–60.

345. Fort Berthold Taking Act, ch. 790, Pub. L. No. 81–437, 63 Stat. 1026 (1949).

346. Colonel Lewis A. Pick, head of the Missouri River Division of the Army

main structural component of the large Pick-Sloan Program for the harnessing of the Missouri River for basinwide economic and social development purposes.³⁴⁷ The Flood Control Act of 1944 had earlier authorized a plan that directed the Bureau of Reclamation and the Army Corps of Engineers to harness the Missouri River for the multipurpose water resources development: hydroelectric power production, navigation improvement, irrigation development, flood control, and public recreation.³⁴⁸

The Fort Berthold Indians had been required to bear a substantial and disproportionate share of the needed public investment for the Pick-Sloan Program.³⁴⁹ The Garrison Diversion Unit Commission ("GDUC"), an eleven member congressionally appointed body, made this finding based on its review of the legislative record of the 1949 taking act.³⁵⁰ It was convinced that the Fort Berthold people had suffered devastating economic, cultural, and social losses due to the federal taking of their most productive agricultural lands.³⁵¹ It also found that Congress may have failed to make the Fort Berthold Indians whole for losses arising from the 1949 taking.³⁵² It therefore directed the Indians' trustee—the Secretary of the Interior—to hold administrative hearings on the Indians' just compensation and related claims.³⁵³

Corps of Engineers, was determined to go ahead with the Garrison Dam even though that site had reportedly been considered and rejected earlier by the Corps' engineers as impracticable. See Meyer, *supra* note 45, at 239.

347. See *id.*

348. Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat 887, 897. The states in the lower and upper Missouri River Basin differed as to why the Missouri River should be controlled by a series of federal dams and reservoirs. The upstream states (North and South Dakota, Montana, and Wyoming) were interested primarily in developing the irrigation potential of the river. The downstream states (Nebraska, Iowa, Kansas, and Missouri) were more interested in flood control. Meyer, *supra* note 45, at 239.

349. This was the finding of the Garrison Diversion Unit Commission ("GDUC"), an 11 member congressional commission that had been created in 1984 to assess the impacts of the Garrison Project on the peoples of North Dakota. *Recommendations of the Garrison Diversion Unit Commission and H.R. 1116, A Bill to Implement Certain Recommendations of the Garrison Diversion Unit Commission Pursuant to Public Law 98-360, Hearings on H.R. 1116 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 99th Cong. 114 (1985) [hereinafter *GDUC Recommendations*].

350. The GDUC was charged by section 207(c)(2)(A) of its authorizing statute to assess the "costs and benefits incurred and opportunities foregone" by affected stakeholder groups due to the construction of the Garrison Dam. Energy and Water Development Appropriations Act, Pub. L. No. 98-360, § 207(c)(2)(A), 98 Stat. 403, 412 (1984). The commission concluded that the "Fort Berthold Indian Reservation bore an inordinate share of the cost of implementing Pick-Sloan Missouri River Basin Program mainstem reservoirs." *GDUC Recommendations*, *supra* note 349, at 114.

351. *GDUC Recommendations*, *supra* note 349, at 114.

352. *Id.*

353. It recommended that the Interior Secretary establish a five-member commission to assess and report on the steps necessary to "complete the indemnification of Indian communities of North Dakota that were disrupted by construction of Pick-Sloan

Interior Secretary Donald Hodel was directed by the GDUC report to establish a secretarial commission that would examine the Fort Berthold Indians' claims that arose from the 1949 Garrison taking.³⁵⁴ He was also directed to recommend appropriate implementing legislation if his commission concluded that the federal government had failed justly to compensate the Fort Berthold Indians.³⁵⁵ He established the Joint Tribal Advisory Committee ("JTAC") by secretarial charter in 1985 to hear and evaluate the Fort Berthold Indians' claims arising from the 1949 taking.³⁵⁶ That commission construed its charter so as to allow the Fort Berthold Indians to present relevant lay and expert testimony regarding their just compensation claim.³⁵⁷ The Indians urged the JTAC to review the entire circumstances surrounding the federal taking of their lands.³⁵⁸ Such a

Missouri Basin Program dams and reservoirs." *Id.* at 74.

The GDUC recommended that the Interior Secretary appoint the five-member commission no later than January 31, 1985, that would address the following issues on the Fort Berthold Indian Reservation:

- Full potential for irrigation
- Financial assistance for on-farm development costs
- Replacement of infrastructures lost by the creation of Garrison Dam
- Preferential rights to Pick-Sloan Missouri Basin power
- Development of shoreline recreation potential
- Return of excess lands
- Additional financial compensation
- Protection of reserved water rights
- Other items the five-member Commission may deem appropriate
- Funding of all items from Garrison Diversion Unit funds, if authorized.

Id. at 187.

354. See *id.* at 74, 187.

355. The GDUC cited section 207(c)(2)(H) of Pub. L. No. 98-360, 98 Stat. 412, the institutional equity section of that statute, as the legal basis for directing the Secretary to establish the Joint Tribal Advisory Committee ("JTAC") and to "recommend corrective measures, if warranted." *GDUC Recommendations*, *supra* note 349, at 188.

356. Secretary Donald Hodel created the JTAC on May 10, 1985, and that committee submitted its final report to the Secretary on May 23, 1986. See S. REP. NO. 102-250 (1992).

357. The JTAC report documented the devastating effects of the Garrison and Oahe Dams, which caused the removal of tribal peoples and communities and flooded "prime tracts of the Missouri River bottomlands." *Id.* at 3.

It also recommended a range of just compensation for the respective injured Indian tribes—between \$181.2 million and \$349.9 million for Standing Rock and \$178.4 million and \$411.8 million for Fort Berthold. This just compensation recommendation was "intended to substitute for or replace the [tribal] economic base that was taken as the site for Lake Sakakawea and Lake Oahe." *Id.*

358. Chairman Edward Lone Fight testified in oversight hearings regarding the JTAC Report that the lengthy negotiations from 1946 to 1949 between the Fort Berthold Indians and the federal government demonstrated the Three Affiliated Tribes' entitlement to just compensation in the amounts recommended by JTAC. *Final Report and Recommendations of the Garrison Unit Joint Tribal Advisory Committee, Hearings Before the Senate Select Comm. on Indian Affairs, Senate Comm. on Energy & Natural Resources, and House Comm. on Interior and Insular Affairs*, 100th Cong. 30-41 (1987).

comprehensive review was essential for a reliable inquiry into the fairness of the 1949 federal taking of the affected Indian lands.³⁵⁹

Whether the federal government had made a good faith effort to justly compensate the Fort Berthold Indians was the most significant issue confronted by the JTAC. That issue focused the JTAC's attention on the administrative and legislative record that justified the 1949 Indian taking.³⁶⁰

Testimony by natural resource economists and related experts aided the JTAC in its examination of the Indians' claims.³⁶¹ They provided the JTAC with a valuation theory of Indian lands that fulfilled the "make whole" standard of the Just Compensation Clause.³⁶² Other expert testimony provided the JTAC with historical and sociological evidence of the 1949 taking's devastating effects on the tribal farming and ranching economy.³⁶³

359. The Senate report on the JTAC recommendations recites that:

The Pick-Sloan Plan was presented to the tribes as a fait accompli. The Corps of Engineers was so confident that it could acquire the Indian land it needed through the Federal power of eminent domain that it began to construct the dams on the reservations even before opening formal negotiations with tribal leaders. Consequently the tribes realized that resistance was futile. Gradually they resigned themselves to making the most of whatever compensation might be offered.

S. REP. NO. 102-250, at 2.

Chairman Murry of the JTAC testified before the Senate Select Committee on Indian Affairs that the federal government had in 1946 and 1947 given "specific and implicit promises of just compensation to the Fort Berthold Indians but that "in many instances [these promises] were never fulfilled and in other instances only partially fulfilled." *Three Affiliated Tribes and Standing Rock Sioux Tribal Equitable Compensation Act of 1991, Hearings on S. 168 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. 15-19 (1991) [hereinafter *Hearings on S. 168*].

360. Chairman Murry's testimony refers to the 1946 congressionally authorized Missouri River Basin Investigations ("MRBI") as concluding that the Fort Berthold Indians were "for all practical purposes, self sufficient." His testimony emphasizes that "Congress recognized that the bottomlands of these reservations represented the sole remaining economic base for the tribes' welfare and their social existence." *Hearings on S. 168, supra* note 359, at 16.

361. See Ronald G. Cummings, *Valuing the Resource Base Lost by the Three Affiliated Tribes as a Result of Lands Taken from Them for the Garrison Project* (1986) (unpublished report prepared for the JTAC, on file with author).

Dr. Cummings valued these lost tribal lands by estimating the "flow of the land-base earnings or income that was attributable to that resource." *Hearings on S. 168, supra* note 359, at 17. Dr. Cummings then "capitalized [the expected income flows] at 3.5 percent, which was then the Congressionally mandated rate in 1950, and then he raised this [amount] to 1986 dollars at the time we were filing the report this totaled \$178.4 million for the Fort Berthold Reservation." *Id.*

362. The JTAC retained Dr. Ronald G. Cummings, a leading natural resources economist, to prepare a valuation report that would assess the nature and amount of "damages to [tribal] infrastructure" that was caused by the construction of the Garrison Dam and Reservoir on the Fort Berthold Reservation. See *Hearings on S. 168, supra* note 359, at 17.

363. Chairman Murry testified that enactment of S. 168 "would move toward just

The Fort Berthold Indians' misfortune was to be in the way of the federal government's proposed development of the water resources potential of the Upper Missouri River Basin. Congress' conflicting roles as Indian guardian and as the resource developer of last resort on behalf of its non-Indian constituencies in the Upper Missouri River Basin fundamentally compromised its institutional ability to justly compensate the Fort Berthold Indians. Congress ultimately chose to sacrifice the Indians' economic and cultural interests to achieve its latter goal.³⁶⁴

But the Fort Berthold Indians' claim for just compensation was strenuously opposed by the Bureau of Indian Affairs ("BIA").³⁶⁵ Indeed, Secretary Hodel eliminated the just compensation issue from the JTAC's charter despite the GDUC's explicit direction to the contrary. However, the JTAC construed the "other issues" portion of its charter so as to allow it to hear the Indians' claim.³⁶⁶ The BIA argued that the taking act barred this claim.³⁶⁷ But the GDUC's express directive and its own secretarial charter persuaded the commission to hear the Fort Berthold Indians' just compensation claim.³⁶⁸

compensation" for the Fort Berthold Indians as a means of helping that tribe re-establish a viable economic base "that was destroyed by the construction of the two dams and the resulting impoundments." *Id.* at 18.

364. Michael L. Lawson asserts that:

Without prior warning the Corps of Engineers entered Fort Berthold Reservation to begin construction of the dam in April 1946. The first of the army's Pick-Sloan projects on the main stem of the Missouri River was Garrison Dam, which became America's fifth largest dam at a cost of over \$299 million. The 212-foot-high structure provided a storage capacity of 24.2 million acre-feet and a generating capacity of 400,000 kilowatts. Its long reservoir, Lake Sakakawea, was named for the famous Shoshone woman who helped guide Lewis and Clark on their expedition up the Missouri in 1804.

MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944-1980, at 59 (1982).

365. The Senate report recounts that the Bureau of Indian Affairs' testimony was "strongly opposed to S. 168 [because] the United States is under no continuing legal liability to provide any additional compensation to either tribe." *See* S. REP. NO. 102-250, at 7 (1992).

The BIA's hearings representative contended that the Fort Berthold Indians had "already been compensated by the Federal Government for the taking of their land," and the United States has "no legal liability to provide additional compensation." *Hearings on S. 168, supra* note 359, at 53 (statement of Patrick Hayes, Deputy Assistant Director of Trust Services).

366. The GDUC's finding that "tribes of the Standing Rock and Fort Berthold Indian reservations bore an inordinate share of the cost of implementing Pick-Sloan Missouri Basin Program mainstem reservoirs" and its direction to the Secretary that he "find ways to resolve inequities borne by the tribes" were interpreted by the JTAC as a warrant for hearing the Indians' just compensation claims. S. REP. NO. 102-250, at 3.

367. The BIA viewed the Fort Berthold Taking Act, Pub. L. No. 81-437, 63 Stat. 1026 (1949), as a full and complete settlement of all Indian claims that may have arisen from that taking. *See Hearings on S. 168, supra* note 359, at 29.

368. *See Hearings on S. 168, supra* note 359, at 30-31.

B. The Background of the 1886 Sovereign Bargain that Established the Fort Berthold Indian Reservation

The Three Affiliated Tribes—the Arikara, Hidatsa, and Mandan peoples—had resided from time immemorial within the riparian lands and valleys of the Missouri River and its tributaries.³⁶⁹ The Missouri River, called the “Big Muddy” by unappreciative non-Indian settlers, once flowed freely through lands then carpeted with mixed grass prairie. Its basin had been home to vast herds of buffalo and prong horn antelope. It also served as home to the Arikara, Hidatsa, and Mandan peoples, whose material and spiritual cultures were inextricably linked to both these lands and herds.³⁷⁰

The Mandans were especially dependent on the Missouri River for their subsistence. They were farmers who cultivated the alluvial soils near the rivers where the water table was high enough to support their crops without using irrigation and where temperatures were more moderate than on the plains.³⁷¹ But they also hunted the wild game that frequented the river valleys. They used the river valleys’ abundant cottonwood and other trees for firewood and building materials. They used the lush vegetation as pasturage for their thriving livestock herds.³⁷² The Mandans were later joined by two other Indian tribes, the Hidatsa and Arikara. These three tribes banded together for common defense against the influx of woodlands Sioux who had flooded into the Great Plains from the forest lands of Minnesota in the early eighteenth century.³⁷³ In 1886, the Three Affiliated Tribes

369. Meyer, *supra* note 45, at 232–34.

370. The Treaty of Fort Laramie in 1851 confirmed the Fort Berthold Indians’ rights to a large aboriginal area of some 12.5 million acres. This area included the right bank of the Missouri River from the mouth of the Heart River to the mouth of the Yellowstone River. This description enclosed a vast land mass that extended in line from the mouth of the Powder River in Wyoming to the headwaters of the Heart River. *See id.* at 223.

371. *See id.* at 233.

372. The Fort Berthold Indians, Meyer notes, made a “satisfactory adjustment” to a “forbidding” country and climate during the “centuries they had lived in the Upper Missouri Valley.” *Id.* Meyer concludes that they had become “even more attached” to the land by the 1940s. *Id.* The Indians made full use of the available natural resources of their reservation: “the wild game, the fruits and berries, the timber that grew in the river bottoms and along the tributary ravines, [and] the lignite coal found here and there in readily accessible form.” *Id.*

Gordon Macgregor, the chief author of the 1946 congressionally mandated *MRBI Reports*, examined the impact of the Garrison Dam on the Fort Berthold Indians and concluded that “[p]eople and land make a virtually unbroken social and geographical unit.” Meyer, *supra* note 45, at 233.

Meyer comments that this fact is “usually overlooked” by “those who believed that the Indians could be adequately compensated for the loss of their land by a cash payment. *By far the greater part of their income was derived, directly or indirectly, from the land.*” *Id.* (emphasis added).

373. Meyer describes the reduced state of the Fort Berthold Indians by the 1860s. Their numbers had been decimated by small pox and other diseases. They were “penned up” in their agency-established village and unable to defend themselves against the increasingly aggressive Sioux. Meyer, *supra* at 225. Ironically, the hostile Sioux were able to obtain

reluctantly agreed to occupy the present Fort Berthold Indian Reservation that was established by agreement with the United States.³⁷⁴

The Missouri River was a friend to the Fort Berthold Indians. But non-Indian settlers and urban city dwellers viewed the river's frequent floods as a menace to their lives and property. Several times during the early 1940s, the Missouri River overflowed its banks and wreaked havoc on downstream cities, including Omaha, Nebraska.³⁷⁵ Colonel Lewis Pick of the Army Corps of Engineers had to ask civilian volunteers for help in manning the levees along the river in 1943. On April 15 of that year, the river crested at twenty-two feet, some twelve feet above its normal level.³⁷⁶

Congress, after the massive floods of 1943 subsided, directed Colonel Pick to propose a comprehensive approach for the multipurpose control and development of the Upper Missouri River Basin.³⁷⁷ But two rival water resource development plans were offered for congressional consideration: the Bureau of Reclamation's plan, sponsored by W. Glenn Sloan, and the U.S. Army Corps of Engineers' plan, sponsored by Colonel Pick. At the behest of President Franklin D. Roosevelt's staff, these two plans were eventually merged in a "shotgun wedding" and emerged from Congress in 1944 as the Pick-Sloan Program.³⁷⁸

The Pick-Sloan Program was hailed by its proponents as the answer to the region's prayers for an end to the twin devastations caused by recurring summer dust bowls and spring floods.³⁷⁹ The program called for a mammoth multipurpose water development programs that entailed the construction of five major mainstem dams along the Missouri River. The contemplated dams would include Gavins Point near Yankton, South Dakota; Big Bend at Fort Thompson, South Dakota;

horses, firearms, and annuity goods from traders and government agents. Chief White Shield of the Arikaras complained in 1870 that prior to becoming "agency Indians" they had been able to defend themselves; now "when we listen to the whites we have to sit in our villages, listen to [the Sioux's] insults, and have our young men killed and our horses stolen, within sight of our lodges." *Id.*

374. By that 1886 agreement the Fort Berthold Indians ceded all their lands north of the 48th parallel and west of a north-south line drawn six miles west of the most westerly point of the Big Bend in the Missouri River. This agreement was not ratified until 1891. *Id.* at 224.

375. Constance Hunt contends that the U.S. Army Corps of Engineers' channelization and diking of the Missouri River from 1912 to 1927 contributed to the flood potential that later devastated downstream cities such as Omaha during the 1940s. See CONSTANCE E. HUNT, *DOWN BY THE RIVER: THE IMPACT OF FEDERAL WATER PROJECTS AND POLICIES ON BIOLOGICAL DIVERSITY* 116-17 (1988).

376. Disastrous floods in the early 1940s led the downstream Missouri River states to demand a comprehensive congressional plan for flood control. *See id.* at 117.

377. As a result of the disastrous 1943 flooding of the Missouri River, Congress directed the Army Corps of Engineers to draw up a flood control program for the Upper Missouri River Basin. Colonel Pick responded with a brief ten-page plan that called for the construction of levees along the river, dams on several tributaries, and several major dams between Sioux City and Fort Peck. *See Meyer, supra* note 45, at 239.

378. HUNT, *supra* note 375, at 117.

379. *See id.*

Oahe at Pierre, South Dakota; and Garrison at Riverdale, North Dakota.³⁸⁰ But the Pick-Sloan Program was as much a product of interagency political competition as it was of rational water resources planning.³⁸¹ According to resource economist David C. Campbell:

[T]he Pick-Sloan Program was a victory of politics and bureaucracy over economics and nature. The Corps had lost a huge chunk of its jurisdiction with the creation of the Tennessee Valley Authority. BuRec, which has converted much of California water resources into an intricate plumbing network, was looking to expand eastward. There was serious talk of creating a Missouri Valley Authority ["MVA"] modeled on the Tennessee Valley Authority, which would have displaced both the Corps and BuRec. They, along with the Federal Power Commission and the Department of Agriculture, resisted the proposed MVA.³⁸²

Both the U.S. Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("BuRec" or "Bureau") had substantial roles in the development of the Pick-Sloan Program. The Corps was assigned the job of constructing the multipurpose facilities on the Missouri River and flood control facilities on the tributaries. The Bureau was assigned the job of building the program's irrigation facilities on the Missouri River, as well as the multipurpose dams on the tributary streams.³⁸³

The Corps and the BuRec carefully planned the Pick-Sloan Program so that its reservoirs would not inundate any non-Indian towns along the Missouri River. But the Three Affiliated Tribes were not so fortunate. The Garrison Dam was intended to serve as the "high dam—the major regulating structure—in the Pick-Sloan Program. It was to be sited on the Fort Berthold Indians' last remaining riparian lands."³⁸⁴ These lands were remnant of the Indians' historic treaty lands of some 12.5 million acres. By its 1886 agreement with the Fort Berthold Indians, Congress had expressly guaranteed their exclusive use and occupancy of these riparian lands.³⁸⁵

Congress commissioned in 1946 a comprehensive social and economic assessment of the likely impacts on the Fort Berthold Indians of the siting of the Garrison Dam and Reservoir on that reservation.³⁸⁶ These interdisciplinary

380. *See id.*

381. *See id.* at 117–118.

382. *Id.* at 118.

383. *See id.*

384. *See* JOHN E. THORSON, RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER 65 (1994).

385. Congressman Lemke from North Dakota made it clear that by taking the affected Indian lands, Congress was "again violating a treaty solemnly entered into [in 1886] with these tribes—a treaty in which we promised never to disturb them again." Cummings, *supra* note 361, at 3.

386. Meyer reports that the BIA began "making surveys as early as the summer of 1945 to determine who and what would have to be moved where." Meyer, *supra* note 45, at 265. Additional contract planning staff was employed to complete a series of investigations

assessments were based on extensive on-site work and analysis of the lives and economy of the Fort Berthold people. The team of economists, anthropologists, and sociologists that compiled the *Missouri River Basin Investigations Reports* ("MRBI Reports") confirmed what the Fort Berthold Indians had long asserted before the Indian congressional committees: siting one of the world's largest earth-filled dams on the Fort Berthold Indian Reservation would irretrievably disrupt the economic and social life of an ancient tribal people.³⁸⁷

These reports recited the expected impacts of the Garrison Dam on the Fort Berthold people. First, approximately ninety percent of the Indian people would have to be removed from their historic settlements along the bottom lands of the Missouri River.³⁸⁸ Second, the agricultural treaty purposes of the Fort Berthold Reservation would be frustrated due to flooding of the Indians' arable land base.³⁸⁹ Third, the only agriculturally self-sufficient Indian tribe on the Great Plains would have its economic and social base destroyed by the proposed flooding and would

regarding the impact of the Garrison Dam on the Fort Berthold Indians. These reports became part of the *MRBI Reports* that would help inform the Indian congressional committees about needed legislative action. These reports, published as *MRBI Report*, No. 46, include H.D. McCullough, *Social and Economic Report on the Future of the Fort Berthold Reservation, North Dakota* (Dec. 24, 1947), and Gordon Macgregor & John C. Hunter, *Survey of Attitudes Regarding Resettlement Among the Three Affiliated Tribes of the Fort Berthold Indians* (Nov.-Dec. 1946). Meyer, *supra* note 45, at 266 n.2.

387. Gordon Macgregor, a leading sociologist, commented on the future impact of the Garrison Dam on the Fort Berthold Indians and succinctly summarizes the reservation lands' value to those Indians:

The "reservation" is to the Fort Berthold Indian his homeland. Within it are abandoned village sites of the Gros Ventre and Mandan and the site of the last village where they and the Arikara lived in a common community following their old village life. They were never assigned this land and forced to reside on it as prisoners of war as were many tribes of the nomadic plains culture. The "reservation" is the last holding of their former lands where they farmed and hunted before the coming of the white man.

Meyer, *supra* note 45, at 237-38 (quoting Gordon Macgregor, *Attitudes of the Fort Berthold Indians Regarding Removal from the Garrison Reservoir Site and Future Administration of Their Reservation*, 16 N.D. HIST. 56 (1949)).

388. Ralph Shane, agency superintendent, estimated that the Garrison Dam would require "that 90% of the total population were moved 'lock, stock and barrel' from their old homes to new homes on the highlands." They were to be "uprooted, shuffled and mixed" and every "semblance of organization was destroyed." Meyer, *supra* note 45, at 266.

But the economic impact was even more devastating. Meyer estimates that while the Indians "lost one-fourth of the reservation lands, the Indians were losing nearly all of the Class I and II agricultural lands—the rich bottomlands on which they had lived for generations." *Id.*

389. The *MRBI Reports* exhaustively and meticulously detailed the expected adverse effects of the Garrison Dam on the Fort Berthold Indians. More importantly, they how Congress should act legislatively to mitigate and ameliorate these impacts. Meyer, *supra* note 45, at 265-74.

likely be reduced to dependence on the federal government for their future subsistence and maintenance.³⁹⁰

Meanwhile, the Corps was working feverishly to lay the major earthen groundworks of the Garrison Dam. Critics of the Pick-Sloan Program contended that project proponents hoped that by the time the *MRBI Reports* were made to Congress, so much time, money, and effort would have been sunk into the Garrison project that Congress would be loathe to cancel it or to force major project revisions on behalf of the Fort Berthold Indians.³⁹¹ However, in 1946 Congress did respond to the Indian pleas to stop the dam's construction. Congress statutorily forbade the Corps' building of any of the dam's major structural features until the Secretary of War located and offered an adequate replacement reservation to the Fort Berthold Indians.³⁹²

The Secretary of War was required to locate and offer this substitute reservation to the Fort Berthold Indians before he could actually construct the Garrison Dam,³⁹³ and had to provide them with replacement compensation for their

390. Meyer, *supra* note 45, at 235-37. The House Subcommittee on Public Lands concluded that the Fort Berthold Indians in 1949 were "in sight of complete economic independence" due to their "strong and growing cattle industry and steadily expanding agricultural program." Cummings, *supra* note 361, at 6.

391. Meyer reports that "work was speeded up in 1946, and by August the construction of an access road to the damsite, the work bridge, and the town site of Riverdale was well under way." Meyer agreed with the "calloused" view of project proponents that the federal government would not abandon this six-million dollar investment regardless of the "Indians' plight." Meyer, *supra* note 45, at 249.

392. A tribal delegation was assured in 1945 by Congressmen that "no work can be done until some settlement is made as to their status." *Id.* at 246. That assurance was statutorily embodied in the War Department Civil Appropriations Act for 1947. Section 6 of that act stated:

No part of the appropriation for the Garrison Reservoir herein contained may be expended for actual construction of the dam itself until the Secretary of War shall have selected and offered, through the Secretary of the Interior, to the Three Affiliated Tribes, land which the Secretary of the Interior approves as comparable in quality and sufficient in area to compensate the said tribes for the land on the Fort Berthold Indian Reservation which shall be inundated by the construction of the Garrison Dam: *Provided further*, That said selection and offer by the Secretary of War and approval by the Secretary of the Interior shall be consummated before January 1, 1947, after which consummation actual construction of the dam itself may proceed."

War Department Civil Appropriations Act, Pub. L. No. 79-374, § 6, 60 Stat. 167 (1946).

393. The Secretary of War commenced his efforts to locate replacement reservation lands well before the statutory requirement to do so was enacted. One such proposal was to add some 470,000 acres of land that lay to the west and southwest of the Fort Berthold Reservation. However, tribal leader Martin Cross characterized that offered land as "good country for rattlesnakes and horned toads." His attitude was representative of the Indians' unwillingness to exchange any of their present lands for the so-called "lieu lands" that were to be offered by the War Secretary in compliance with the statutory command. Meyer, *supra* note 45, at 249.

lands.³⁹⁴ But dam proponents argued that such a standard of compensation was too high and would set a dangerous precedent for the Corps' negotiations with the downstream Indian tribes who likewise opposed taking of their lands for the Pick-Sloan Program.³⁹⁵

The Secretary of War suggested that it would be hard to convince local non-Indian communities to accept the creation of a large replacement reservation for the relocated Fort Berthold Indians.³⁹⁶ He nonetheless did locate and propose a couple of potential new reservation sites. But the Secretary of the Interior rejected these sites as failing to meet the statutory requirement that the replacement lands be of "like quality and quantity" as the taken Indian lands.³⁹⁷ In the meantime, project proponents contended that the Indians' refusal to accept these replacement lands demonstrated the impracticability of this congressional compensation scheme.³⁹⁸

Substantial constituent pressure motivated Congress to move speedily on the construction of the Garrison Dam.³⁹⁹ Given the Indians' and the Interior Secretary's 1947 rejection of the proffered "Stanton Block" as the War Secretary's last offer of replacement Indian lands, it rescinded the Garrison construction ban.⁴⁰⁰ The Fort Berthold Indians were now to be removed from their lands so as to make way for the Garrison Dam and Reservoir.⁴⁰¹

394. First Deficiency Act, 1946, ch. 589, Pub. L. No. 79-269, 59 Stat. 632, 654 (1945).

395. LAWSON, *supra* note 364, at 62-63.

396. Meyer reports that only one non-Indian community in the proposed lieu land areas was at all "ambivalent." That was the town of Stanton, which would be excluded from the lieu lands grant but saw a money-making opportunity if it were to become the agency headquarters of the "new" Fort Berthold Reservation. Meyer, *supra* note 45, at 253.

397. The War Department's "last offer" of the Stanton block of lieu lands was rejected by Interior Secretary Krug in January, 1947, as failing to meet the statutory requirement of "like quantity and quality" of the reservation lands. Krug's rejection signaled the death knell for the lieu lands proposal and congressional attention shifted to the possibility of a cash payment to the Indians for their taken lands. *Id.* at 255.

398. Governor Aandahl and Senators Young and Langer of North Dakota agreed that the Garrison Dam must go forward and that the Fort Berthold Indians must be removed to make way for the dam. Senators Young and Langer proposed to introduce a bill that made possible either the piecemeal relocation of the Indians or a general cash settlement. The governor pushed for a new Garrison Dam bill without any "Indian clause limitation," which would allow the Indians to be removed upon payment for their lands on the same basis as the affected non-Indians in the area. *Id.* at 255.

399. Congress' rescission of the "Indian Clause" was regarded as a victory for the pro-dam forces represented by the Governor and State Water Commission of North Dakota. *Id.* at 256.

400. War Department Civil Appropriations Act, ch. 411, Pub. L. No. 80-296, 61 Stat. 686, 690 (1947).

401. Meyer comments that Pub. L. No. 80-296 represented "forced" legislation that ignored the interests and treaty reserved rights of the Fort Berthold Indians. The language of the bill, regarded as a triumph for the Governor and North Dakota Water Commission, specified that the Indians would be paid \$5,105,625.00 for the "acquisition of lands and rights therein within the taking line of Garrison Reservoir which lands lie within the area now established as the Fort Berthold Indian Reservation, North Dakota, including

The Fort Berthold Indians continued their battle for just compensation. But Colonel Pick intensely lobbied the Indian leaders to accept a proposed contract that would facilitate the removal of the Indian people and hasten the construction of the dam. His proposed agreement treated the Fort Berthold Indians as if they were mere private condemnees whose lands were taken for a federal purpose.⁴⁰² The proposed contract also required the federal government to pay for removing the Indians.⁴⁰³ A leading commentator concluded that the tribal leaders accepted this contract as the only way of ensuring that their tribal members had some subsistence support after they were removed from their lands.⁴⁰⁴ Colonel Pick, believing that he had been insulted by tribal members at a meeting in 1947, characterized the Fort Berthold Indians as belligerently uncooperative, and used that incident as a "reason to dictate his own settlement terms to Congress."⁴⁰⁵

The Fort Berthold Indians objected to their treatment as mere private non-Indian condemnees.⁴⁰⁶ They insisted that their right to sue for just compensation in the appropriate judicial forum be preserved in any agreement.⁴⁰⁷ They argued that just compensation was owed for real losses that arose from the devastation of their tribal economy and governmental capabilities.⁴⁰⁸ A Corps-Indian contract was signed in an emotion-filled ceremony in Secretary Krug's office on May 20, 1948.⁴⁰⁹

Senator Watkins reasoned that Congress, not the courts, was the appropriate forum for the determination of a "just and generous" settlement for the Fort Berthold Indians, one that would "prevent[] the necessity for any further

all elements of value above or below the surface thereof including all improvements, severance damages and reestablishment and relocation costs." 61 Stat. at 690. This appropriation was contingent upon the conclusion of a contract between the Indians and the United States or the money was to return to the Treasury on a certain date. Tribal representatives, such as Jefferson B. Smith, who appeared to testify regarding this bill were given the "cold shoulder" and were later told that they had agreed to accept this appropriation as compensation for their taken lands. Meyer, *supra* note 45, at 256-57.

402. Meyer ironically comments that this proposed contract gave the Indians a better deal than they were to ultimately receive via the 1949 Taking Act. For example, the Indians, under Article 10, were to have free use of the area between the taking line and the actual shoreline for hunting, fishing, trapping, and grazing uses as well as boat harbor and other recreational uses. Under Article 12, they were to receive a one-eighth royalty from any oil or gas that may be later extracted from lands within the taken area. *Id.* at 258-59.

403. *Id.* at 259.

404. Meyer comments that the Fort Berthold Indians accepted their inevitable fate and began "working out a contract so as to avoid losing the money that had been conditionally appropriated for them." *Id.* at 258.

405. LAWSON, *supra* note 364, at 60.

406. Meyer, *supra* note 45, at 257

407. The Indians were successful in inserting a provision that would allow them to bring a just compensation suit in the Court of Claims for any additional damages "of any treaty obligation of the Government or any intangible cost of reestablishment or relocation, for which the said tribes are not compensated by the said \$5,105,625." War Department Civil appropriations Act, 1948, ch. 411, Pub. L. No. 81-296, 61 Stat. 686, 690 (1947).

408. Meyer, *supra* note 45, at 261.

409. *Id.* at 259.

action in the Court of Claims.”⁴¹⁰ Senator Watkins urged his Indian committee colleagues to reject any Indian agreement that recognized the Indians’ right to just compensation. Terminating the Fort Berthold Indians’ right to a judicial determination of just compensation was appropriate, he reasoned, given the “substantial unanimity of opinion [in the Senate] to the effect that the Congress should provide for a definitive settlement with the Three Affiliated Tribes.”⁴¹¹

Watkins’ counsel to his committee colleagues to formulate the “complete and final settlement of all [Indian] claims and demand[ed]” congressional plenary power over Indian lands.⁴¹² Nonetheless, he assured the Fort Berthold Indians that any congressional settlement would be “both just and generous...thereby removing any reason [or] necessity for any further action in the Court of Claims.”⁴¹³ But the Fort Berthold Indians remained unconvinced of Senator Watkins’ sincerity regarding the justice of a congressionally imposed settlement.⁴¹⁴

C. The Doctrinal Basis for a Modern Indian Takings Doctrine

The Fort Berthold Indians argued before JTAC that Senator Watkins’ Indian committee demonstrably failed to justly compensate them for their taken lands, that their lands should be valued on the same basis as non-Indian lands that serve comparable governmental or public welfare functions.⁴¹⁵ They contended that

410. Cummings, *supra* note 361, at 18. The original version of House Joint Resolution 33 ratified the terms of the contract and added \$9.5 million dollars in additional compensation to cover items not covered by the contract. Attorney Case, on behalf of the tribe, argued that the capitalized value of the factors of income from the reserved lands totaled \$24,561,000, from which he deducted \$2,580,000 as the value of the residual reservation lands, leaving a just compensation claim of \$21,981,000. But the chairman of the House subcommittee accepted the BIA’s just compensation figure of \$14,605,625. This amount of compensation, coupled with a three million dollar readjustment fund and grant of 20 megawatts of preference power to the Indians from the future Garrison power plant, proved far too generous to Senator Watkins of the Senate Indian Affairs Committee. His committee struck out everything in the contract, changed the purpose of the bill, and reduced the just compensation appropriation to four million dollars. Meyer, *supra* note 45, at 261–63.

411. Cummings, *supra* note 361, at 17. Cummings quotes Interior Secretary Krug’s letter to Watkins’ Indian committee wherein Krug concludes that such a congressional settlement may eliminate the “more protracted and less certain remedy of a suit in the Court of Claims” given that there “might be a question of whether the real needs of the tribes, directly caused by the taking of their lands, could be made the legal basis of an award.” *Id.* at 18.

412. *Id.* at 18.

413. *Id.*

414. Cummings cites the fact that each “successive effort by Congress to propose a settlement for the Tribes’ taken lands seemed to offer less and less to the Tribes—a trend that did not escape the attention of the Tribes.” *Id.* at 18–19.

415. Cummings concluded that the Fort Berthold Indian Reservation represented a dedicated public or governmental entity whose lands and territory possessed a value to the tribal community that far transcended their fair market value. He cited the 1886 agreement between the Fort Berthold Indians and the United States as confirming the governmental and public welfare status of the Indians’ reserved lands: “[T]his Reservation is formed) in

this valuation standard would fulfill two important underlying goals of the Just Compensation Clause. First, such a valuation standard would ensure the continued viability of the Three Affiliated Tribes as a recognized government consistent with the purposes of its 1886 agreement with the federal government.⁴¹⁶ Second, such a valuation standard would discourage future "rent seeking" initiatives by Indian congressional committees that sought to exploit their plenary power over Indian lands for their non-Indian constituents' benefit.⁴¹⁷

The 1886 sovereign bargain that established the Fort Berthold Indian Reservation declared that the reservation was formed in order for the Mandan, Hidatsa, and Arikara Tribes "to obtain the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry."⁴¹⁸ This goal was to be realized by the Indians' development of the agricultural potential of their reserved riparian farming and grazing lands along the Missouri River and its tributary streams.⁴¹⁹ The 1946 *MRBI Reports* confirmed that without these riparian lands, the Three Affiliated Tribes would not achieve the treaty's goal of economic and social independence.⁴²⁰

self-supporting by the cultivation of the soil and the other pursuits of husbandry." *Id.* at 14-15 (quoting Agreement of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1032).

416. Cummings points to the Indian committees' keen awareness, in light of the *MRBI Reports*, that the Fort Berthold Indians would lose the vast majority of their arable and irrigable land base that was the essential means for carrying out the purposes of the 1886 treaty agreement. *Id.* at 23-24.

417. See Lunney, *supra* note 250, at 753-61.

418. 26 Stat. at 1032

419. The critical role of the Indians' reserved Missouri River bottom lands as the keystone economic base for their tribal future and security is expressed in an August 1949 *MRBI Report to Congress*:

Most of the natural resources upon which the Indians depend for subsistence will be wiped out by the completion of the Garrison project. These losses must be replaced by cash income. The reservoir area includes most of the timber land from which building materials, fence posts and firewood are obtained. In these river bottomlands are the junberries, wild plums and chokecherries which form such an important part of the Indian diet. It is estimated that the wild life losses will cut off most of the supply of deer and other game since these animals and birds are dependent upon the brush and timber for their existence. Most of the surface coal deposits from which Indians mine their coal will be flooded...families obtain almost all their fuel, a large portion of their meat and fruit, a considerable amount of garden vegetables, and most of their building material without the expenditure of any cash. After the inundation of these natural resources by the Garrison Reservoir Project, the amount of cash required for subsistence will be greatly increased.

Cummings, *supra* note 361, at 21.

420. Mr. R. W. Rietz, Indian Agency Relocation Officer, concluded that although there were 420 Indian families on the historic reservation, the residual reservation lands would be able to support only 175 families. The rest would likely, in his opinion, have to be re-educated in vocational skills to survive in off-reservation job placement. *Id.*

In other words, these Indian lands formed the essential trust res of the Fort Berthold Indians' Tribes' economic and governmental infrastructure.⁴²¹ That res was composed of the easily irrigable bottom lands of the reservation. Destruction of these lands imposed on the Fort Berthold Indians economic losses to be measured by the capitalized value of the expected future incomes that would be generated by their lands. The Corps' flooding of the Fort Berthold lands destroyed the Indians' governmental and economic resource base as completely as would any comparable natural cataclysm.⁴²²

Private lands, assets, and capital are protected by the Just Compensation Clause from similar demolition by governmental action.⁴²³ But Senator Watkins worked to persuade his congressional colleagues that the Fort Berthold Indians deserved less compensation for their lost capital assets than similarly situated non-Indian entities.⁴²⁴ The value of these Indian lands transcended their individual parcel value, but Senator Watkins' Indian committee failed to acknowledge this basic reality.⁴²⁵

However, the JTAC did recognize that the federal government had a legal duty to make the Fort Berthold Indians whole for their economic losses.⁴²⁶ Therefore, the JTAC directed Dr. Ronald G. Cummings, a leading natural resource economist, to do an assessment of the Indians' economic losses imposed by the

421. The Indian committees recognized that the Fort Berthold Indians had abided by the terms of the 1886 agreement and that their development of a ranching and agricultural industry had rendered them in sight of complete economic independence and justified compensation for the "reestablishment of a sound economic base for the future of said tribes." 95 CONG. REC. 8930 (1949).

422. The Indian committees recognized that the Fort Berthold Indians were bound by treaty agreement, tradition, and custom to their reserved tribal lands that were intended to serve in perpetuity as their homeland. Unlike the non-Indian farmer or rancher who can take his condemnation payment from the government and buy like farmland in a nearby state, the Fort Berthold Indians could not replace their unique territory, social, and governmental status through the payment of fair market value. Cummings, *supra* note 361, at 20.

423. The Supreme Court enunciated the equivalent value or "make whole" standard for just compensation in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 341 (1893). The private owner of lands that are taken for public use is to be put in "as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934).

424. Cummings cites the "log-rolling" between the House Subcommittee on Public Lands and the Senate Indian Affairs Committee that resulted in progressive and arbitrary reductions of the proposed just compensation amounts to the Fort Berthold Indians as evidence of an institutional failure to comply with anything resembling the "make whole" command of the Just Compensation Clause. Cummings, *supra* note 361, at 22-24.

425. In October 1845, Acting Interior Solicitor Felix S. Cohen gave his legal opinion before Watkins' Senate Indian Affairs committee regarding the Corps' power to condemn the Fort Berthold lands. He testified that a right of condemnation by the Corps did not exist over tribal lands and that if Congress exercised its plenary power to take those lands, it would be in breach of its treaty agreements with the Fort Berthold Indians. Meyer, *supra* note 45, at 244.

426. *Hearings on S. 168, supra* note 359, at 16-19.

1949 taking.⁴²⁷ He was directed to use known and accepted 1949 valuation standards as the means to capitalize the stream of income the Indians would have received from those lands.⁴²⁸ Such a valuation approach replicated Congress' 1946 valuation standard that required the War Department to provide the Indians with the "in-kind" replacement value of their taken lands.⁴²⁹ The War Secretary had been instructed to provide the Indians with "land...comparable in quality and sufficient in area to compensate the said Tribes for the land on the Fort Berthold Reservation which shall be inundated by the construction of Garrison Dam."⁴³⁰ Only "in-kind" replacement or substitute compensation would fairly compensate the Fort Berthold Indians for the taking of their lands.⁴³¹

The 1946 Congress expressly rejected the Corps' claim that "parcelized" valuation of the Indian lands would provide just compensation to the Fort Berthold people. Congress recognized that the Indians' treaty-reserved lands were tribal public welfare and governmental facilities whose intrinsic value could not be measured by the Corps' traditional land valuation approach.⁴³² Those Indian lands

427. *Id.* at 17.

428. *Id.*

429. Senate Report 102-250 emphasized that the JTAC's recommended compensation amount was intended to "substitute for or replace the value of the economic base that was taken as the site for Lake Sakakawea and Lake Oahe." See S. REP. NO. 102-250, at 3 (1992).

430. Meyer, *supra* note 45, at 246.

431. *Id.* at 251-52.

432. Chairman Murry emphasized the JTAC's awareness that "Congress...required the War Department, by statute, [in 1946] to provide a suitable replacement reservation called 'in lieu lands' so that the reservation as an ongoing concern could continue." *Recommendations of the Garrison Unit Joint Tribal Advisory Committee Regarding the Entitlement of the Three Affiliated Tribes and the Standing Rock Sioux Tribe to Additional Financial Compensation for the Taking of Reservation Lands for the Site of the Garrison Dam and Reservoir and the Oahe Dam and Reservoir, Hearings on H.R. 2414 Before the House Comm. on Interior and Insular Affairs*, 102 Cong. 109 (1992) (statement of Emerson Murry, Former Chairman of the Joint Tribal Advisory Commission) [hereinafter *Hearings on H.R. 2414*]. Because the department was unable to do so, "Congress decided to pay [the Fort Berthold Indians] compensation in lieu of replaced lands, with the amount to be a substitute for the replacement valuation." *Id.*

Chairman Murry described the valuation methodology undertaken by the JTAC to establish a just compensation amount for the taking of the Fort Berthold Indian Reservation in 1949.

The JTAC, in an attempt to value these lands that were taken and damages to the infrastructure did procure the services of a Dr. Ronald G. Cummings, who specializes in resource economics, to prepare a report on the issue. He emphasized that the 156,000 acres of land taken were the sole major resource available to carry out the purposes of the Fort Berthold Indian Reservation. He chose the value of these resources by estimating the flow of land-base earnings or income that was attributable to that resource and the methodology he used contemplates the exchange of one income producing asset for another. Of course, that "in lieu" or income producing asset to be exchanged was money damages. He then had this cash that would have been received

had been perpetually dedicated to tribal governmental and economic uses by the 1886 agreement. These background factors persuaded the JTAC that the just compensation owed the Indians should be measured by the capitalized value of the expected stream of income that they would have derived from their lands.⁴³³

The JTAC also rejected the BIA's contention that the 1949 Taking Act barred the Indians' claim for just compensation. The JTAC read its explicit directive from the GDUC and its own charter as requiring the renewed scrutiny of the federal government's conduct in the taking of the Fort Berthold Indians' lands.⁴³⁴ It had been empowered to recommend an equitable solution as the basis for possible congressional legislation.⁴³⁵ Like the GDUC, its congressional predecessor, the JTAC was to investigate fully the impacts on Indians of the Garrison Project and to recommend remedial legislation that would redress those impacts in a fair and equitable manner.⁴³⁶ It concluded that only such an equitable remedy would put the Fort Berthold Indians in as good a position pecuniarily as they would have occupied if their property had not been taken.⁴³⁷ The JTAC concluded simply that just compensation had not been provided to the Fort Berthold Indians.⁴³⁸

The JTAC then determined that replacement or substitute value of the taken lands would adequately compensate the Indians for their losses due to the 1949 taking.⁴³⁹ Such an alternative valuation standard has been endorsed by the Supreme Court in the federal taking of lands that served essential governmental or public welfare functions. The Court held that the just compensation standard required that such essential governmental resources be valued at their substitute or replacement cost.⁴⁴⁰ The Fort Berthold Indians' taken lands provided the social

capitalized at 3.5 per cent, which was then the Congressionally mandated rate in 1950, and then he raised this to 1986 dollars at the time we were filing the report this totalled \$178.4 million for the Fort Berthold Indian Reservation.

Hearings on S. 168, supra note 359, at 17.

433. *Hearings on S. 168, supra* note 359, at 17.

434. S. REP. 102-250, at 3.

435. The JTAC was expressly created by Secretary Hodel "to find ways to resolve the inequities" borne by the Fort Berthold Indians. *Id.*

436. Congress concurred in the JTAC's findings that the Fort Berthold Indians had never been adequately compensated for their lands taken as the site for the Garrison Dam and Reservoir. *Id.* at 8.

437. Cummings cites fair market value as the baseline standard of valuation that the Supreme Court typically applies as the basis of just compensation to private parties whose lands have been taken for governmental purposes. He synthesized the leading Supreme Court decisions on the appropriate valuation standard for private property or resources. Cummings, *supra* note 361, at 9-14.

438. *Hearings on S. 168, supra* note 359, at 17.

439. *Id.*

440. The taking of dedicated governmental or public welfare facilities triggers the application of the substitute valuation doctrine that was articulated in *Brown v. United States*, 263 U.S. 78 (1923). The Court recognized that when land or public welfare facilities are condemned or taken by the federal government, an alternate valuation standard other than fair market value may be used to make the wronged party whole. The Court in *Brown*

welfare and governmental benefits described by the Court, by their use in ranching and agricultural employment as was contemplated by the 1886 agreement. Only the continued existence of those lands, or the just compensation equivalent, would ensure that the Fort Berthold Indians would be able to fulfill the governmental and economic goals that were contemplated by the 1886 sovereign bargain between them and the federal government.⁴⁴¹

The JTAC fashioned an equitable remedy based on the substitute or replacement value of the taken Indian lands.⁴⁴² It recognized that payment of the fair market value of any taken property generally satisfies the "full and perfect" equivalent and "make whole" standard of the Just Compensation Clause.⁴⁴³ But the Court in *Olson v. United States* held that it is "the property and not the cost of it that is safeguarded by state and Federal Constitutions."⁴⁴⁴ The Court also made it clear that if a fair market price prevailed for private property taken for public use, then that ruling market price should define the just compensation amount owed to the injured private party.⁴⁴⁵ Conversely, if there is no active market for specialized public or social welfare resources, then a commission, like JTAC, is authorized to resort to alternative valuation methods other than fair market value.⁴⁴⁶ The JTAC recognized that the Court had stringently limited the application of this alternative valuation standard to those circumstances wherein the property taken was of a kind that is seldom exchanged on a market or that has a value transcending any

held that "[a] method of compensation by substitution would seem to be the best means of making the parties whole." *Brown*, 203 U.S. at 82. Cummings cites the post-*Brown* decisions that expanded the reach and scope of the substitute valuation doctrine as it applies to unique or irreplaceable lands or resources that are either not traded on any market or have elements of value that transcend market value. Cummings, *supra* note 361, at 12-14.

441. Cummings points to the 1886 Fort Berthold treaty language and legislative history of Public Law 479 as clearly establishing the inextricable relationship between the "Tribe's arable lands (virtually all of which were in their taken lands) and the basic purposes intended for the Reservation (to allow the Tribes to become 'wholly self-supporting by the cultivation of the soil and other pursuits of husbandry.')" Cummings, *supra* note 361, at 15 (citations omitted). He concludes that the Tribe's reserved bottom lands unequivocally represented treaty-established "public welfare facilities" that were intended to serve as the perpetual homeland for the Fort Berthold Indians. *Id.*

442. Cummings had been directed by the JTAC to recommend an equitable valuation methodology that addressed the Indians' claims that their treaty-reserved lands that were taken in 1949 had served as the unique situs for their governmental, associational, and cultural homeland pursuant to the 1886 Fort Berthold agreement. He concluded that an equitable valuation methodology would have capitalized the values of all the n-factor and related incomes that the Fort Berthold Indians would have derived from their reserved lands in perpetuity. *Id.* at 25-31.

443. *Hearings on S. 168*, *supra* note 359, at 17.

444. *Olson v. United States*, 292 U.S. 246, 255 (1934).

445. *United States v. New River Collieries Co.*, 262 U.S. 341, 343 (1923) ("When private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation.... More would be unjust to the United States and less would deny the owner what he is entitled to." (citations omitted)).

446. *United States v. Miller*, 317 U.S. 369, 374 (1943).

ostensible market price.⁴⁴⁷ The Court in *Miller v. United States* further qualified the general applicability of the fair market value standard, holding that “[w]here, for any reason, property has no market, then resort must be had to some other data to ascertain its value.”⁴⁴⁸

The JTAC was persuaded that the Fort Berthold Indians’ lands were a paradigmatic example of governmental or social welfare resources. Therefore, the JTAC concluded that the value of the taken Indian lands could not be reliably determined by resort to fair market value.⁴⁴⁹ The 1946 Congress had recognized this same fact by its adoption of the substitute or replacement value as the basis of the just compensation award to the Fort Berthold Indians.⁴⁵⁰

The JTAC’s valuation approach sought to do justice to both the federal government and the Fort Berthold Indians. It refused to make a fetish of market value as the only or best measure of just compensation. But it was also appropriately wary of “those...special circumstances” of Indian lands that have no fair market value. It sought expert testimony and evidence regarding the appropriate valuation methodology that would fairly value those lands from an objective viewpoint.⁴⁵¹ It recognized that the fair market valuation method would

447. The testimony of JTAC’s Chairman Murry before the Senate Select Committee on Indian Affairs recognized that fair market value is not the exclusive valuation method for taken Indian lands. *Hearings on S. 168, supra* note 359, at 17. The JTAC’s valuation approach is likewise confirmed by a Second Circuit decision holding that “fair market value ‘is not an absolute standard nor an exclusive method of valuation.’ ... It should be abandoned ‘when the nature of the property or its uses produce a wide discrepancy between value of the property to the owner and the price at which it could be sold to anyone else.’” *United States v. Certain Property Located in the Borough of Manhattan*, 403 F.2d 800, 802 (2d Cir. 1968) (citation omitted).

448. *Miller*, 317 U.S. at 374.

449. The JTAC’s Chairman Murry cited Dr. Cummings’ extended treatement of the public welfare character of the Fort Berthold Indian lands as strongly influencing the JTAC’s recommendation of the equitable award of just compensation for those taken lands. *Hearings on S. 168, supra* note 359, at 17.

450. *Id.*

451. Emerson Murry, Chair of the JTAC, testified before the House Committee on Interior and Insular Affairs that the JTAC employed Dr. Ronald G. Cummings, a natural resource economist, to prepare a valuation report regarding the just compensation issue raised by the Fort Berthold Indians. Murry pointed out that the 156,000 acres of taken reservation lands were the “sole resource available to carry out the purposes of the reservation.” *Hearings on H.R. 2414, supra* note 432, at 110. He emphasized that the JTAC wanted Cummings to construct an “exchange value” of the taken lands for an equivalent income-producing financial asset. *Id.* He explained the JTAC’s response to the “grossly inadequate amount” of compensation paid to the Indians under the 1949 taking act that did not allow the Indians sufficient compensation to “replace their economic base” that was taken as the site for the Garrison Dam. *Id.* Murry cited the *MRBI Reports* to Congress evidencing that the Three Affiliated Tribes were “self-sufficient, well-integrated Societies” before the advent of the Garrison Dam. The just compensation amount of \$178.4 million recommended by the JTAC was derived from Dr. Cummings capitalization of the factor returns or perpetual earning capacity of the Indians’ taken lands at a 1949 rate of 3.5%. Chairman Murry hoped the House committee would recommend that amount of just

not capture the unique characteristics of the Fort Berthold lands, and thus resorted to the alternative valuation approach announced in *Brown v. United States*.⁴⁵²

The circumstances of the 1949 Fort Berthold taking strikingly resembled the facts presented in the *Brown* decision. In *Brown*, the federal government took three-quarters of the business center of a town as the site for a water reservoir.⁴⁵³ The town's lands had provided the region's inhabitants with a wide array of economic and public welfare values. The injured parties were the region's inhabitants who had historically depended and relied on the services provided by this town. The Court concluded that the real value of these nonmarket services and opportunities could not be captured by any market-based concept of value.⁴⁵⁴

By adopting the alternative valuation approach, the JTAC acknowledged that the Fort Berthold Indian Reservation was established in 1886 for specific governmental and public welfare purposes: to provide a permanent homeland for the Three Affiliated Tribes.⁴⁵⁵ The Indians' ethnographic and legal history persuaded the JTAC that the 1886 agreement contemplated the perpetual use of the reservation's fertile and productive bottomlands as the Indians' resource base.⁴⁵⁶ The 1946 Congress rejected the idea that the Fort Berthold Indians were only entitled to the fair market value of their individual parcels of trust lands.⁴⁵⁷ Thus, both JTAC and the 1946 Congress agreed that only replacement value for the taken lands would ensure that the Indians were made whole. For that reason, the JTAC directed Cummings to prepare a land valuation assessment that would allow the commission to reasonably ascertain the cost of providing property in substitution for the Fort Berthold Indian lands.⁴⁵⁸

compensation on behalf of the Fort Berthold Indians because it would "materially move the Tribes forward in their efforts to establish a viable economic base." *Id.* at 11.

452. The Court reasoned that:

A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole.

Brown v. United States, 263 U.S. 78, 82-83 (1923).

453. *Id.*

454. *Id.*

455. *Hearings on S. 168, supra* note 359, at 16-18.

456. *Id.*

457. The 1946 Congress required that the Fort Berthold Indians be provided "land...comparable in quality and sufficient in area to compensate the said tribes for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam." War Department Civil Appropriations Act, Pub. L. No. 79-374, § 6, 60 Stat. 167 (1946).

458. Cummings, *supra* note 361, at 15-16

D. Why the Congressional "Good Faith" Standard Fails to Provide Just Compensation to Injured Indian Peoples

The 1949 Congress' alleged failure justly to compensate the Fort Berthold Indians was a key issue for JTAC investigation. That investigation required an examination of the legislative record of the 1949 Taking Act.⁴⁵⁹ Although Congress does enjoy a qualified immunity to Indian taking claims,⁴⁶⁰ it must make a good faith effort to provide the injured Indians with the fair value of their taken lands.⁴⁶¹ The Indians argued that the legislative record demonstrated that Congress did not make such a good faith effort.⁴⁶² They also contended that JTAC's charter and the GDOC's directive required a searching inquiry into the issue of congressional good faith.⁴⁶³

Congress is no longer allowed to take Indian lands as a mere incident of its exercise of guardianship power over those lands.⁴⁶⁴ It must satisfy a reviewing federal court that it made a good faith effort to fairly compensate the affected Indians for their lands.⁴⁶⁵ The reviewing federal judge must evaluate the relevant legislative history and surrounding circumstances of an alleged taking in making this good faith determination.⁴⁶⁶

But this good faith test may well prove illusory, as it did in the Fort Berthold experience, to ensure that the affected Indians are justly compensated for their taken lands. Absent an objective valuation standard, there is simply no reliable reference point for the court's evaluation of claimed congressional good faith.⁴⁶⁷

Restricting the JTAC's inquiry to a review of the legislative record of the 1949 Fort Berthold taking illustrates this point: two congressional Indian

459. *Id.* at 14–25.

460. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

461. *Id.* at 416–17.

462. Cummings concluded that "Congress was asea in terms of a well developed line of reasoning as to just what would compensate the [Fort Berthold Indians] for their loss of an economic base." Cummings, *supra* note 361, at 25. This was true, despite the fact that it was "well established in economic theory" that governmental or public welfare resources "such as land, water and minerals may constitute a 'resource base,' or 'economic base,' whose value extends well beyond the market value of the resource *per se*." *Id.*

463. Professor Newton emphasizes the difficulty that a reviewing court faces in implementing the good faith inquiry into Congress' compensation of injured Indian peoples. Newton, *supra* note 34, at 259.

464. *Sioux Nation*, 448 U.S. 371.

465. *Id.* at 416–17.

466. Professor Newton demonstrates the inquiry burden that the good faith standard imposes on a reviewing court. Newton, *supra* note 34, at 259–60.

467. Cummings cites the congressional committees' "admixture of interests" as the lead developer of the Pick-Sloan Project as preventing Congress from fairly valuing and compensating the Fort Berthold Indians for their taken lands. He cites to the Court's admonition that "[t]he right of the legislature...to apply the property of the citizen to public use, and then to constitute itself the judge to determine what is the just compensation it ought to pay therefor...cannot...be tolerated under our constitution." Cummings, *supra* note 361, at 24.

committees—the House Public Lands Committee and the Senate Indian Affairs Committee—agreed that it was necessary to take the Fort Berthold Indians' lands as the site for the Garrison Dam,⁴⁶⁸ but there is little or no discussion regarding the value of those lands to the Indian people.⁴⁶⁹ The JTAC would have searched in vain for any principled guidance on the meaningful calculation by those committees of the just compensation amount that was owed to the Fort Berthold Indians.⁴⁷⁰

Indian congressional committees, given their deeply conflicting interests, are rarely capable of objectively valuing Indian lands as is envisioned by the Court's *Sioux Nation* decision. They are neither sufficiently disinterested nor sufficiently expert to be entrusted with the task of calculating the just compensation amounts that are owed to injured Indian peoples.⁴⁷¹

Reliance on congressional Indian committees' subjective land valuations renders the Just Compensation Clause nearly meaningless.⁴⁷² A "make whole" standard that begins and ends with Indian congressional committees' good faith assertions subjects Indian compensatory rights to the vagaries of the political process.⁴⁷³ The JTAC would have been unable to perform its mandate consistent with its GDUC directive and its secretarial charter if it had been bound by this review standard.⁴⁷⁴ It would have ignored the fundamental gap between what the 1946 Congress promised as compensation to the Fort Berthold Indians and the amount that the 1949 Congress actually provided to them under the 1949 Taking Act.⁴⁷⁵ The 1949 report of the Senate Indian Committee declared that "the real needs of the tribes directly caused by the taking of their lands" must be the basis for a legislative award of just compensation.⁴⁷⁶ But this rhetorical flourish is empty

468. Meyer, *supra* note 45, at 260–64.

469. Professor Newton perhaps would not find surprising the Indian committees' failure to evaluate the Indians' economic losses in objective economic terms. Newton, *supra* note 34, at 259–60.

470. Cummings, *supra* note 361, at 19–24.

471. Cummings rhetorically asks:

In light of the above, we might well ask: what *was* Congress' view of that amount of money that would justly compensate the Tribes for their taken lands? \$17 million, "more than" \$20 million, \$21-plus million, or \$30 million? Moreover, we might inquire as to the logical grounds on which *any* of these possible settlements were derived. In the end, of course, the "how much" question was resolved at still a different amount: \$5.1 million for the Tribes' lands and relocation costs...and \$7.4 million for, essentially, any other claim that one might think of. The question as to how the Congress arrived at these figures remains open. We find no discussions in the Congressional records that describe the bases for this determination of what would be just compensation to the Tribes for their taken lands.

Id. at 24–25.

472. Newton, *supra* note 34, at 259–60.

473. *Id.*

474. *Id.*

475. *Hearings on S. 168, supra* note 359, at 50.

476. The Senate report accompanying H.R.J. Res. 33, 81st Cong. (1949), concludes that the:

of meaning unless it is read in conjunction with the 1946 congressional directive to provide replacement or substitute compensation to the Fort Berthold Indians.⁴⁷⁷ The JTAC gave substance to this promise by "reading in" the 1946 Congress' valuation of the affected Indian lands.⁴⁷⁸ The JTAC found that only this amount of compensation would enable the Fort Berthold Indians to survive as a viable economic and governmental entity.⁴⁷⁹

The Indian committees were obviously aware of this issue. The House Committee on Public Lands poignantly expressed its concern about the future survival of the Three Affiliated Tribes.⁴⁸⁰ But it did not translate its concern into any cognizable just compensation theory or valuation principle. It found that the Fort Berthold Indians' development of an agricultural livestock industry on their reserved bottom lands had rendered them "in sight of complete economic independence" as contemplated by the Fort Berthold agreement.⁴⁸¹ It concluded that compensation was required "for the destruction of the basic industry of the said tribes; for the intangible costs of relocation and for the reestablishment of a sound economic base and the future of said tribes."⁴⁸²

These Indian committees were well aware of the critical role of the taken lands in light of the Department of Interior's report in August of 1949, which stated:

Most of the natural resources upon which the Indians depend for subsistence will be wiped out by the completion of the Garrison project. These losses must be replaced by cash income.

proposed legislation provides for a complete and final settlement of all claims and demands of said tribes for all damages sustained by reason of the taking of said lands and rights in the Fort Berthold Indian Reservation, and of all other claims and demands of said tribes whether of tangible or intangible nature, or any alleged claims or demands, arising out of the said treaty of September 17, 1851 (11 Stat. 749), or any other treaty (including any unratified treaty) or agreement, prior to the approval and acceptance of the provisions of this resolution.

S. REP. NO. 81-605, at 3-4 (1949).

The Senate Report explains that this resolution "remove[s] any reason for further petition to Congress for additional money and prevent[s] the necessity for any further action in the Court of Claims." *Id.* at 6-7.

477. Cummings, *supra* note 361, at 18.

478. *Hearings on H.R. 2414, supra* note 432, at 109-10.

479. Murry points to the original version of H.R.J. Res. 33, which called for a just compensation amount of \$17.1 million to be paid to the Fort Berthold Indians for their taken lands. Murry notes that not even this admittedly "inadequate congressional amount" was paid to the Indians. Instead, the Indians were later offered \$12.6 million by Congress on a "take it or leave it basis." See *Hearings on H.R. 2414, supra* note 432, at 109-10.

480. The House Committee on Public Lands explained that because of the Garrison dam the Indians' "homes will be lost, their cattle industry will be ruined, their churches and schools, and their social life will be completely disrupted." H.R. REP. NO. 81-544, at 3 (1949).

481. *Id.*

482. Cummings, *supra* note 361, at 20-21.

The reservoir area includes most of the timber land from which building materials, fence posts and firewood are obtained. In these river bottomlands are the june-berries, wild plums and chokecherries which form such an important part of the Indian diet. It is estimated that the wild life losses will cut off most of the supply of deer and other game since these animals and birds are dependent upon the brush and timber for their existence. Most of the surface coal deposits from which Indians mine their coal will be flooded....

....

...[Indian] families obtain almost all of their fuel, a large portion of their meat and fruit, a considerable amount of garden vegetables, and most of their building materials without the expenditure of any cash. After the inundation of these natural resources by the Garrison Reservoir Project, the amount of cash *required for subsistence will be greatly increased.*⁴⁸³

But the Indian committees' failure to fairly value the taken Indian lands reflects Senator Watkins' power over the legislative process. The harsh reality was that a "governmental subsystem" of western congressional delegations and related constituency interests disproportionately influenced Indian congressional committees.⁴⁸⁴ This influence is patently evident in the 1949 legislative hearing record regarding the Fort Berthold taking. It is virtually silent regarding the just compensation that would respond to the economic costs imposed on the Fort Berthold Indians by the taking of their treaty-reserved lands.⁴⁸⁵ The House Committee on Public Lands and the Senate Indian Affairs Committee did briefly debate this cost versus loss basis of just compensation.⁴⁸⁶ For example, the House committee was clearly uneasy with the Corps' cavalier assertion that payment of fair market value to individual Indian allottees would adequately compensate Fort Berthold Indians:

The Committee on Public Lands feels that [\$17 million dollars] is small compensation for the disruption forced upon the 2,215

483. *Id.* at 21 (quoting BUREAU OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, REPORT NO. 94, SOCIAL & ECONOMIC REPORT OF FORT BERTHOLD RESERVATION 12, 17 (Supp. I 1949) (emphasis added)).

484. Lunney, *supra* note 250, at 753-56.

485. Cummings found this congressional silence puzzling given three factors that would have enabled Congress to fashion an appropriate just compensation methodology for the Fort Berthold Indians: First, he cited "legal precedents...which would provide guidance...to...insure[] that sufficient damages will be awarded to finance replacement for the condemned facility." Cummings, *supra* note 361, at 19-20. Second, he cited Congress' grasp of the Fort Berthold lands as a permanent "homeland to the Tribes" as expressed in the 1886 agreement, which specified the terms that the Indians were "'to become wholly self supporting by cultivation of the [Missouri river bottom lands]',...their sole resource base for pursuing agricultural activities." *Id.* at 20. Third, he cited the Indian congressional committees' failure to use established precedent to establish a baseline valuation of the taken Indian lands as an analytic departure point for providing the Fort Berthold Indians with just compensation for their taken lands. *Id.* at 21-23.

486. *Id.* at 22-24.

Indians. A *conservative estimate* of the basic value of the lands and their annual use value is approximately \$21,981,000. Therefore, the United States by making the settlement [at \$17 million], will obtain the reservoir right-of-way at about two thirds of its basic value and its annual use value to the Three Affiliated Tribes.⁴⁸⁷

Individual congressmen, such as Mr. Lemke from North Dakota, expressed their dismay that the Fort Berthold Indians were to be paid an amount of compensation substantially less than the real economic value of their treaty-reserved lands.⁴⁸⁸ He colorfully expressed his opinion on this issue:

Here is a factory...that produced a net income last year of \$774,000. That alone capitalized at 4 percent equals about twenty million. Surely no one would voluntarily surrender an income of 4 percent on twenty million for less than twenty million cash.

....

In taking these lands, we are...depriving these tribes of their land *for less than its value*.⁴⁸⁹

Interior Secretary Krug commented ironically about the fairness of the House committee's proposed \$17 million payment as just compensation to the Fort Berthold Indians:

[I]t is well to bear in mind that the Indians would much prefer to retain their existing reservation intact. In the discussions preceding the execution of the contract, they expressed the belief that it would require \$30 million to compensate them properly for what is being taken from them. If they are willing to accept the lesser benefits provided for in the contract and in House Joint resolution 33, I believe the approval of this compromise would be to the *best interests of the United States*.⁴⁹⁰

Secretary Krug was referring to the House committee's proposed compensation package that was to serve as the basis for just compensation to the Three Affiliated Tribes.⁴⁹¹ This proposed compensation package was embodied in House Joint Resolution 33 and included these elements:

1. \$5.1 million for the fair market value of the Indian trust parcels of lands that were to be taken and related relocation costs;⁴⁹²

2. \$3 million for a land readjustment fund that would be used to consolidate fragmented land holdings of tribal members into viable economic units and for purchasing private lands for needy tribal members;⁴⁹³

487. H.R. REP. NO. 81-544, at 3-4 (1949).

488. Meyer, *supra* note 45, at 263.

489. 95 CONG. REC. 15052, 15051 (1949) (statement of Rep. William Lemke) (emphasis added).

490. Cummings, *supra* note 361, at 23-24 (emphasis added).

491. *Id.* at 22-23.

492. H.R. REP. NO. 81-544.

493. *Id.* at 10.

3. \$6.5 million as additional compensation to the Three Affiliated Tribes for "values not compensated for under the contract;"⁴⁹⁴

4. 20,000 kilowatts of electric power (when available from the Garrison Dam):

for sale and distribution by the...Tribes...delivered at such point or points on the reservation...as may be determined by the Secretary of the Interior. Payment shall be made for the power actually used at the lowest wholesale rate or rates, applicable to the same class of service made available to other customers.... The transmission and distribution system necessary for the delivery of such... power...shall be constructed with funds made available...by the U.S. without cost to the said tribes;⁴⁹⁵

and

5. Construction of "any irrigation works and related facilities which...the Secretary of the Interior determines to be feasible...."⁴⁹⁶ If constructed, the irrigation works must be operated on a basis not less favorable than to non-Indian lands, and the costs thereof must be repayable in accordance with the terms of other laws applicable to Indian lands.⁴⁹⁷

This proposed compensation package—including the 20 megawatts of future-delivered low cost hydroelectric power—was valued by the House Committee on Public Lands at approximately seventeen million dollars.⁴⁹⁸ The committee members stated that the seventeen million dollars proposed compensation to the Indians "would be to the best interest of" the federal government.⁴⁹⁹ The earlier *MRBI Reports* to Congress had capitalized the economic value of the taken Fort Berthold lands at a conservative estimate of \$21,981,000.⁵⁰⁰

The harsh reality was that the Fort Berthold Indians—when all the "horse trading" was completed between the House and Senate Indian committees—were to receive substantially less compensation than was recommended as the "bare minimum" by the House Committee on Public Lands.⁵⁰¹ The Fort Berthold Indians did not receive an amount between the seventeen million to thirty million dollar range that was judged by the House committee as the minimum fair amount of compensation for the Indians' taken lands.⁵⁰² Indeed, the minimum just

494. *Id.* at 11.

495. *Id.* at 12.

496. *Id.* at 13.

497. *Id.* at 36.

498. *Id.* at 12.

499. *Id.*

500. *See Cummings, supra* note 361, at 23.

501. Meyer asserts that "unfortunately the bill did not survive long after it was referred to the Senate Committee on Interior and Insular Affairs." Meyer, *supra* note 45, at 263. That committee struck out everything "except the legal description of the taking area," and the additional just compensation amount was reduced to four million dollars. *Id.*

502. *Id.* At conference on the rival bills, "some House members expressed dissatisfaction with the bill in its final form, as well they might, but a sense of urgency and

compensation amount proposed in House Joint Resolution 33 was substantially reduced by the Senator Watkins' committee.⁵⁰³ This dramatic downward spiral of proposed just compensation did not escape the Fort Berthold Indians' attention:⁵⁰⁴ "We (the tribal council) advised them (the tribal members) that if we should reject the Act (P.L. 437), the next offer of the government would probably not be even as good as the one we are considering."⁵⁰⁵

The Fort Berthold Indians were well aware that the amount of compensation they would receive would be determined by the comparative power of the House Committee on Public Lands and the Senate Indian Affairs Committee. Senator Watkins' influence was reflected in that, in each negotiation round, the proposed amount of just compensation substantially went down.⁵⁰⁶ Ultimately, the House and Senate Indian committees agreed on a just compensation figure of \$12.6 million that would be offered to the Fort Berthold Indians in exchange for taking 156,035 acres of their reservation.⁵⁰⁷ On March 15, 1950, the Fort Berthold Indians reluctantly agreed to accept that amount of compensation and to remove from their historic reservation lands.⁵⁰⁸

E. The Articulation of A "New" Compensation Standard in the Three Affiliated Tribes Equitable Compensation Act of 1992

The JTAC issued its final report in 1986 and recommended that the Secretary of Interior propose legislation on behalf of the Three Affiliated Tribes that would award just compensation to the Three Affiliated Tribes for the 1949 taking of the Fort Berthold Indian Reservation.⁵⁰⁹ The JTAC recommended just compensation to the Fort Berthold Indians in an amount ranging between \$178.4 million and \$411.8 million. In calculating the amount, the JTAC directed Dr. Ronald Cummings to use two alternative formulas. The JTAC's range of just compensation values reflects the application of these alternative land and resource valuation formulas.⁵¹⁰

But Secretary Hodel declined to implement the JTAC's recommendation.⁵¹¹ Instead, the Senate Select Committee on Indian Affairs and the

perhaps of the futility of further wrangling led them to accept it." *Id.*

503. *Id.*

504. Cummings, *supra* note 361, at 19.

505. *Id.*

506. *Id.*

507. Meyer, *supra* note 45, at 264.

508. Meyer reports that "[t]he approval by the Tribes called for was obtained by a vote in which 525 affirmative votes were cast out of 900 eligible voters and on March 15, 1950, council chairman Carl Whitman, Jr., with a seven man delegation, presented a briefcase containing the ballots to Secretary Chapman." *Id.* Local newspapers described this as yet "another emotion laden ceremony." *Id.* Meyer concludes that this ceremony marked the end of the "long struggle between the Fort Berthold Indians and the United States government over the Garrison Dam project." *Id.*

509. See S. REP. NO. 102-250, at 3 (1992).

510. *Id.*

511. *Id.* at 1.

House Interior Subcommittee on Indian Affairs initiated joint oversight hearings on the JTAC's final report in 1986.⁵¹² The JTAC's just compensation recommendation was referred by the Senate Select Committee on Indian Affairs to the General Accounting Office ("GAO") for its review and response.⁵¹³ The GAO report, issued in 1990, concluded that, although it somewhat disagreed with the economic methodology utilized by the JTAC, the JTAC's findings provided a substantial basis for Congress to consider an equitable award of just compensation to the Three Affiliated Tribes in the amount of \$149.5 million.⁵¹⁴ Legislation to implement the JTAC's just compensation recommendation was introduced by Senator Kent Conrad from North Dakota.⁵¹⁵ It provided \$149.5 million in just compensation to the Three Affiliated Tribes for the 1949 Fort Berthold taking.⁵¹⁶ The BIA testified that it had no opposition to this legislation as long as it otherwise met the "pay-as-you-go" constraints of the controlling budget resolution.⁵¹⁷

The Fort Berthold Indians, after lengthy discussions with various interested groups such as the National Rural Electric Cooperatives Association were able to craft an agreement that would authorize the deposit of a specified amount of Pick-Sloan hydropower receipts into a Treasury account on behalf of the Three Affiliated Tribes.⁵¹⁸ The Three Affiliated Tribes were required to submit an economic and social recovery plan for approval by the Secretary of the Interior.⁵¹⁹ The Tribes would have access to the interest from their Treasury account beginning in fiscal year 1998.⁵²⁰ President Bush threatened to veto the

512. The Senate report notes that the Senate Select Committee on Indian Affairs held three oversight hearings on the JTAC recommendations beginning on March 31, 1987, with a joint oversight hearing with the Senate Energy and Natural Resources Committee and the Water and Power Subcommittee of the House Committee on Interior and Insular Affairs. That hearing examined the need for legislation to implement the recommendations of the JTAC report. The second hearing was held on November 19, 1987, wherein the committee "urged" the Tribes to provide "further justification for the level of additional financial compensation to which the tribes felt they were entitled" and "explore a budget neutral mechanism to finance the compensation needed to carry out the recommendations." The third hearing was held regarding S. 168 wherein the tribes "expressed their overall support for the bill" and the GAO "expressed its approval of the compensation figures set forth in [S. 168]." *Id.* at 6.

513. *Id.*

514. GOVERNMENT ACCOUNTING OFF. (GAO), REPORT TO THE CHAIRMAN, SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, INDIAN ISSUES: COMPENSATION CLAIMS ANALYSIS OVERSTATE ECONOMIC LOSSES (May 1991).

515. *Hearings on S. 168, supra* note 359, at 13-15.

516. *Id.*

517. The BIA representative testified that if the "Budget Enforcement Act provisions can be complied with..., the administration would look at that and give consideration to that additional compensation." *Id.* at 31-32.

518. A brief exchange between Senator Conrad and Mr. Dennis Hill, executive vice president of the North Dakota Association of Rural Electric Cooperatives, made clear that, "as drafted," the North Dakota rural electric cooperatives "did not oppose." *Id.* at 26.

519. S. REP. NO. 102-250, at 9 (1992).

520. *Id.* at 4.

legislation, but nonetheless signed the Tribes' compensation act into law in November 1992 as part of a larger water resources development bill.⁵²¹

VI. CONCLUSION

The 1949 Fort Berthold taking demonstrates the need for a modern Indian takings doctrine. Marshall sought to reconcile the competing interest of the United States and the Indian people in his *Johnson v. M'Intosh* opinion.⁵²² By incorporating the Indian lands into paramount federal ownership, while simultaneously confirming the Indian peoples' exclusive use and occupancy rights in those lands, he created an inherently unstable and ultimately untenable land-based relationship between these sovereigns. The Indian peoples were recognized by Marshall's opinions as possessing inherent sovereign authority over their lands. But their subordinated status as governmental wards portended federal dominion over the Indian peoples and their lands.

Indian Country was originally conceived as a federally protected territory wherein Indian peoples would be free to exercise self-governance and to incrementally adapt to non-Indian ways of life. But this Indian Country idea would not survive the later nineteenth-century's vision of an American manifest destiny.⁵²³ Perhaps Marshall hoped that Indian Country would be preserved by his imposition of an Indian bargaining model. That model contemplated that by mutual agreement, the Indian peoples and the federal government could ensure a safe haven for threatened tribal societies and cultures. But Indian bargains over land soon degenerated into a diplomatic shell game. Indian land cession agreements served as the transparent means for the Indian peoples' systematic dispossession. Lone Wolf's resort to the courts to prevent the coerced allotment of his reservation prompted the Court to jettison Marshall's model as inconsistent with the Indian peoples' contemporary status as governmental wards.⁵²⁴

The contemporary survival of Indian societies requires their protection from the ill-advised federal takings of their lands.⁵²⁵ Indian treaties once recognized a vast "Indian-only" zone in the American West: a geographic area wherein the Indian peoples were free to choose a legal, cultural, and economic system that best suited their members' needs.⁵²⁶ The federal government pledged to use its regulatory and military capabilities to preserve this Indian Country boundary.⁵²⁷

But federal protection of Indian lands was always halfhearted at best. Congress eventually repudiated its treaty commitments and bargains in favor of fulfilling its superseding goal of manifest destiny.⁵²⁸ The federal plenary power

521. Reclamations Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, tit. 35, 106 Stat. 4731.

522. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

523. CORNELL, *supra* note 4, at 36-38.

524. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903).

525. Newton, *supra* note 34, at 264-65.

526. WILKINSON, *supra* note 75, at 14-19.

527. *Id.*

528. Newton, *supra* note 34, at 251-52.

doctrine became the engine that would drive Congress' Indian allotment and assimilation policies. Definitive resolution of the "Indian question" was expected in one generation or two at the most.⁵²⁹ But the Indian peoples proved far more resilient and resistant than expected to federal programs that were designed to destroy their tribal land base and their cultural structures.⁵³⁰

The Indian peoples' tenaciousness was rewarded by Congress' repudiation of its allotment program in the 1930s and its adoption of a tribal revitalization program that championed tribal self-determination and self-governance.⁵³¹ This contemporary federal Indian policy seeks to reinstate Marshall's idea of Indian peoples as domestic, dependent nations. But this policy will have little meaning unless it is accompanied by the effective judicial protection of Indian lands. The contemporary Supreme Court seemingly wants to have it both ways: it rhetorically supports the concept of tribal self-determination while reaffirming the congressional plenary power doctrine.⁵³²

The federal government's plenary power over Indian lands threatens to reduce the Indian self-determination policy to rhetorical extravagance. This power threatens those Indian lands that will make possible the hoped-for revitalization of Indian economies and cultures.⁵³³

Just as Congress repudiated its Indian allotment program in the 1930s, so should the Supreme Court now repudiate *Lone Wolf's* plenary power doctrine. Felix S. Cohen's assertion that the Indian peoples were fairly compensated for the taking of their historic lands need not be debated anew.⁵³⁴ Such a retrospective assessment merely reinforces the contemporary need for judicial protection of the Indian peoples' lands from congressional overreaching under the plenary power doctrine.⁵³⁵

The American West has long been settled by non-Indians by virtue of the Indian allotment and land sales program of the late nineteenth century.⁵³⁶ Cohen may well be right that the books should be closed on this sad era of America's treatment of Indian peoples.⁵³⁷ But Cohen would likely agree that any merit in retaining the plenary power doctrine is outweighed by its potential to thwart the contemporary Indian self-determination and self-governance policy.⁵³⁸

529. CORNELL, *supra* note 4, at 45–50.

530. *Id.* at 80–84.

531. *Id.* at 89–93.

532. Newton, *supra* note 34, at 264–65.

533. *Id.* at 264.

534. GETCHES ET AL., *supra* note 10, at 310.

535. Newton, *supra* note 34, at 251–52.

536. CORNELL, *supra* note 4, at 93–101.

537. *Id.*

538. Newton supposes a hypothetical "Indian Allotment Act of 1982" whereby the federal government unilaterally allots each tribal member a 2 acre "ceremonial parcel" and puts the balance of the Indian lands up for sale. The legislative record states that this act intends that the Indians should use their retained lands as purely ceremonial sites for spiritual regeneration from time to time. The sale proceeds from the lands are to be used to

Objections to a modern Indian takings doctrine do not hold up against analysis. First, a modern Indian takings doctrine will not cost the federal Treasury "too much" money.⁵³⁹ The 1992 congressional act that revisited the 1949 Fort Berthold taking illustrates the practical benefits of fairly valuing Indian lands. The Fort Berthold Indians were provided with an equitable amount of compensation that will enable them to make a meaningful recovery from the devastating effects of the Garrison taking. Furthermore, Congress designated that compensation to be paid out of hydropower receipts derived from the sale of electric power from the Pick-Sloan generating plants. This approach effectively internalized the just compensation payment to the project itself. This stream of income from a replacement resource—hydroelectric power—was intended by the 1992 equitable compensation act to replace the Three Affiliated Tribes' expected revenue stream that would have been generated by its taken lands.⁵⁴⁰

Second, a modern Indian takings doctrine would impose a salutary "stop and think" burden on federal agencies and Indian congressional committees. Such a standard will likely tend to preserve the Indian land base.⁵⁴¹ The War Secretary was effectively precluded under the 1946 Garrison statute from taking the Fort Berthold Indians' lands until he provided them with the replacement value of their taken lands.⁵⁴² Just so, those federal agencies or congressional committees that face the true value of Indian lands will be motivated to more carefully deliberate about the need for taking Indian lands or for mitigation measures that will ameliorate the deleterious features of proposed projects.⁵⁴³

train the Indians to acquire marketable skills for deployment within the "civilized" urban areas of America. She further supposes the federal government conducts no geological surveys of the lands' value and does not require competitive bidding at auction. She concludes that the affected Indians may well have no remedy against the federal government in light of the *Sioux Nation* rule. Newton, *supra* note 34, at 261–62.

539. Cummings' analysis emphasizes that costs and benefits attributable to large federal works projects are simply the opposite side of the same coin. Congress' undervaluing in 1949 to appropriately value the Fort Berthold Indians' resource base is a project related "cost" insofar as Congress ignores the real economic value of that foregone public natural resource. Cummings, *supra* note 361, at 25–31.

540. Reclamations Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102–575, tit. 35, 106 Stat. 4731. Cummings suggests an analogous approach when he looks toward so-called Pick-Sloan "excess power revenues" that are not committed to repayment of project-related costs as the source of just compensation for the Fort Berthold Indians. Cummings, *supra* note 361, at 43.

541. Paragraph 2 of section 4(a) of S. 168 provided that:
deposits equal to 25% of the receipts from deposits to the United States Treasury for the preceding fiscal year from integrated programs of the Eastern Division of the Pick-Sloan Missouri River Basin Project shall be deposited automatically in the fund each fiscal year. The amounts so appropriated are to be "non-reimbursable and non-returnable. But the aggregate amount to be deposited in the recovery fund shall not exceed \$149.2 million."

S. REP. NO. 102–250, at 8–9 (1992).

542. Meyer, *supra* note 45, at 246–47.

543. Lunney characterizes a measure of compensation as just if it redresses two

Third, an Indian taking doctrine would give substance to the fiduciary duty that Congress owes to the Indian peoples.⁵⁴⁴ The 1992 Three Affiliated Tribes Equitable Compensation Act provides the Fort Berthold Indians with the financial resources to replace their economic base that was lost to the 1949 taking of their lands.⁵⁴⁵ Requiring the federal government to fully compensate Indian peoples for their economic losses would allow them to more effectively replace those lands and resources that are essential to a viable tribal economy and society.⁵⁴⁶

Fourth, an Indian takings doctrine would recognize that Indian lands many times serve as specialized public welfare and governmental assets—not merely fungible commodities.⁵⁴⁷ Indian peoples by custom, heritage, and treaty bargain are highly immobile. Their lands represent their collective entwinement with their spiritual, emotional, and economic lives. Such immobility is an appropriate circumstance for judicial consideration under a modern Indian takings doctrine.⁵⁴⁸

Fifth, an Indian takings doctrine requires no heroic innovations in existing federal takings law or doctrine. The JTAC in the Fort Berthold case easily applied well known and judicially accepted resource valuation methodologies so as to arrive at a just compensation value for the 156,035 acres that were taken from the Fort Berthold Indians.⁵⁴⁹ This just compensation amount was accepted by the GAO as the basis for a congressional award of equitable compensation to those Indians in 1992.⁵⁵⁰

Sixth, an Indian takings doctrine is a vital component of a contemporary Indian self-determination policy. Those lands that form the economic and

“systemic mistakes” that a legislature will make under what he calls the “majoritarian” and “interest group” models. Lunney, *supra* note 250, at 757. He describes the two mistakes as follows: “(1) fiscal illusion will lead the legislature to impose improper burdens on a scapegoat; and (2) the scape-goating process will lead the legislature to refuse to compensate a scapegoat for a taking.” *Id.* 757–58. He asserts that the compensation requirement must therefore meet two objectives:

First, it must force the government to consider the full costs of its action when it would force a scapegoat to bear the burden of government action [and thereby] reduce the likelihood that...the scapegoat [will be required] to bear a significant government imposed burden either when a member of majority faction could better have borne the burden or when the government should not have taken the action at all. Second, to ensure that the property interests of the scapegoat are protected when they should be.

Id.

544. Newton, *supra* note 34, at 264.

545. S. REP. NO. 102–250, at 3.

546. Cummings, *supra* note 361, at 28.

547. *Id.* at 12.

548. *Id.* at 20.

549. *Id.* at 32–39.

550. Harry Finley testified on behalf of GAO that the Congress would be “using a very defensible method in determining compensation” if it relied on the lower bound of JTAC’s compensation recommendation for the Fort Berthold Indians. *Hearings on S. 168, supra* note 359, at 23.

governmental base for tribal governments must be preserved just like lands held by the federal, state, and local governments.⁵⁵¹ How else can a legitimate "government-to-government" relationship between the federal government and the respective Indian peoples be expected to work? Just as the just compensation principle prevents injury to similarly situated governmental entities, so too should the contemporary Indian peoples be shielded from overreaching by federal agencies or congressional committees under the guise of the plenary power doctrine.

The fate of the Fort Berthold Indians in their direct bargaining with the federal government is a real and symbolic reminder of the need for a modern Indian takings doctrine. Such a doctrine would impose no significant burdens on the federal government while ensuring that the Indian peoples' bargains with the federal government would be reasonably respected.

551. Cummings, *supra* note 361, at 12-13.

